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 status: GRANTED      v.  
                             Riverside Bayview Homes, Inc., et al.  
  
 ocketed:      Court: United States Court of Appeals  
 October 1, 1984      for the Sixth Circuit  
  
 Counsel for petitioner: Solicitor General  
  
 Counsel for respondent: Gienaco, Richard K., Washburn, Edgar  
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entry	Date	Note	Proceedings and Orders
1	Aug 24 1984		Application for extension of time to file petition and order granting same until November 5, 1984 (O'Connor, August 27, 1984).
2	Nov 1 1984	G	Petition for writ of certiorari filed.
3	Nov 14 1984	G	Motion of National Wildlife Federation, et al. for leave to file a brief as amici curiae filed.
4	Nov 26 1984		Order extending time to file response to petition until January 2, 1985.
7	Jan 2 1985		Brief of respondents Riverside Bayview, et al. in opposition filed.
8	Jan 9 1985		DISTRIBUTED. February 15, 1985
9	Jan 10 1985	X	Reply brief of petitioner United States filed.
10	Feb 19 1985		Motion of National Wildlife Federation, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell CUT.
11	Feb 19 1985		Petition GRANTED. Justice Powell CUT.
13	Mar 26 1985		***** Order extending time to file brief of petitioner on the merits until May 6, 1985.
15	Mar 26 1985		Order extending time to file brief of respondent on the merits until June 28, 1985.
16	Apr 15 1985		Joint appendix filed.
17	May 6 1985		Brief amicus curiae of National Wildlife Federation, et al. filed.
18	May 6 1985		Brief of petitioner United States filed.
19	May 6 1985		Brief amicus curiae of California, et al. filed.
20	Jun 7 1985		Record filed.
21	Jun 7 1985		Certified copy of appendix and C. A. proceedings received.
22	Jun 17 1985		Records filed.
23	Jun 17 1985		Certified original records, 1 box and 7 tubes, received.
24	Jun 27 1985		Brief amicus curiae of Citizens of Chincoteague filed.
25	Jun 28 1985		Brief amicus curiae of Pacific Legal Foundation, et al. filed.
26	Jun 28 1985		Brief amicus curiae of American Petroleum Institute filed.
27	Jun 28 1985		Brief amicus curiae of Chamber of Commerce of the US filed.
28	Jun 28 1985		Brief amicus curiae of Mid-Atlantic Developers Association filed.
29	Jun 28 1985		Brief of respondent Riverside Bay View Homes filed.
30	Aug 7 1985		SET FCP ARGUMENT, Wednesday, October 16, 1985. (2nd case).

EDITOR'S NOTE

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32	Oct 2 1985	X	Reply brief of petitioner United States filed.
33	Oct 16 1995		ARGUED.

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No.

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CLERK

In the Supreme Court of the United States  
OCTOBER TERM, 1984

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UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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MAPP

**QUESTION PRESENTED**

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "wetlands" is limited to areas that support aquatic vegetation only by virtue of "frequent flooding" from adjacent streams, lakes, or seas.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. So far as the United States is aware, Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc. Cf. App., *infra*, 22a n.2.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 729 F.2d 391. The judgment order of the district court (App., *infra*, 42a-44a) is unreported. Two previous opinions of the district court (App., *infra*, 22a-31a, 32a-41a) are also unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on March 7, 1984. A petition for rehearing was denied on June 8, 1984 (App., *infra*, 20a-21a). On August 27, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATIONS INVOLVED

Relevant provisions of the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at App., *infra*, 45a-48a.

## STATEMENT

1. The court of appeals has held that respondent's property is not the kind of "wetland" that is subject to the regulatory jurisdiction of the United States Army Corps of Engineers and hence that respondent may fill in its property without securing a permit under Section 404 of the Clean Water Act of 1977 (CWA), 33 U.S.C. 1344. The issue presented by this case is the extent to which the Nation's "wetlands" are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction. Before turning to the facts of this case, we set forth a brief description of "wetlands" generally and the statutory and regulatory scheme for their protection.

a. In general, and not as a strictly legal or jurisdictional matter, wetlands are areas characterized by vegetation growing in soils that are periodically or normally saturated with water. See generally Office of Technology Assessment, Congress of the United States, *OTA-0-206, Wetlands: Their Use and Regulation* (1984) [hereinafter cited as *Wetlands*]; Council on Environmental Quality, *Our Nation's Wetlands, An Interagency Task Force Report* (1978) [hereinafter cited as *Our Nation's Wetlands*]. Familiar types of wetlands are marshes, swamps, and bogs. Wetlands occur along gradually sloping areas between uplands and deep-water environments, such as rivers, or form in basins that are isolated from larger water bodies. *Wetlands* 3. Freshwater wetlands, which account for approximately 90% of total remaining wetlands in the country, may be fed by ground water, surface springs,

streams, runoff from the surrounding terrain, or a combination of these sources. *Our Nation's Wetlands* 10. Water levels in freshwater wetlands rise and recede in part according to rainfall, so that at times they may be quite dry. *Ibid.*

It is widely recognized that wetlands perform unique ecological services. For example, many wetlands purify water by holding nutrients and recycling pollutants, they provide flood protection by retarding surface runoff from rainwater and shielding upland areas from storm damage, and they also provide vital food resources and habitat for fish and wildlife. *Our Nation's Wetlands* 19-27; see also 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). In a 1977 congressional debate, it was reported that wetlands provide \$140 billion worth of flood protection and water purification services. 123 Cong. Rec. 38994 (1977) (remarks of Rep. Lehman).

b. The Clean Water Act of 1977 is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).<sup>1</sup> In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into the Nation's waters, excepting only discharges made in compliance with other sections of the Act.

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge of dredged or

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<sup>1</sup> In 1972, Congress passed extensive amendments to the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and for the first time established a comprehensive federal program for the control and abatement of water pollution. The 1977 amendments to the FWPCA changed the popular name of the statute to the Clean Water Act. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this petition.

fill material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12115. Those regulations limited the Corps' jurisdiction under Section 404 to the same waters previously regulated by the Corps pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* Thus, "navigable waters" for both Section 404 and Rivers and Harbors Appropriation Act purposes initially were defined by the Corps as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce" (33 C.F.R. 209.120(d)(1) (1974)). Under this definition, commonly referred to as the "traditional" definition of navigable waters, the Corps exercised extremely limited jurisdiction over freshwater wetlands; only wetlands subject to such regular inundation by lacustrine or riverine flow so as to be considered part of a navigable water body were encompassed by the regulations.<sup>2</sup>

The Environmental Protection Agency<sup>3</sup> and several federal courts interpreted the CWA as a congressional assertion of broader federal jurisdiction than would be

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<sup>2</sup> In freshwater bodies, only those wetlands below the ordinary high water mark were regulated, and jurisdiction in tidal areas was limited to wetlands below the mean high water mark. 33 C.F.R. 209.260(j) and (k)(ii) (1974).

<sup>3</sup> See 40 C.F.R. 125.1 (1974); *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, EPA Administrator, to Lt. Gen. W.C. Gribble, Jr., Chief, Corps of Engineers).

encompassed by the traditional definition of "navigable waters." *E.g., United States v. Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). In *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act" (*ibid.*).

In response to the order in *NRDC v. Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31320 (1975); 33 C.F.R. 209.120(d)(2) and (e)(2) (1976).<sup>4</sup> On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37122.

Pursuant to the final regulations published in 1977, the Corps' jurisdiction under Section 404 extends to all wetlands that are adjacent to (1) navigable waters as

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<sup>4</sup> The Phase 1 regulations, which were made immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. "Adjacent wetlands" were to be determined by a prevalence of aquatic vegetation and periodic inundation; neither the ordinary high water mark nor the mean high tide line necessarily marked the shoreward limit of jurisdiction. 40 Fed. Reg. 31321, 31324, 31326 (1975). The Phase 2 regulations, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase 1 waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* The Phase 2 regulations, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations (*e.g.*, perched or isolated wetlands and wetlands adjacent to tributaries other than primary tributaries). *Ibid.*

traditionally defined, (2) the tributaries of traditional navigable waters, and (3) interstate waters, whether or not navigable, and their tributaries. In addition, certain intrastate lakes or streams and isolated wetlands are subject to the Corps' jurisdiction if the use, degradation, or destruction of those areas could affect interstate commerce. See 33 C.F.R. 323.2(a).<sup>5</sup>

The regulations pertinent to this case provide as follows (33 C.F.R. 323.2(c) and (d)):

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

2. Riverside Bayview Homes, Inc., owns approximately 80 acres of property in Macomb County, Michigan, near Lake St. Clair. In November 1976, Riverside submitted an incomplete permit application to fill

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<sup>5</sup> The Corps' current definition of "waters of the United States" is a reworded, but substantively unchanged, version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See 47 Fed. Reg. 31795 (1982). Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs, regardless of which agency administers a particular program. For this reason, the impact of the decision below may extend beyond the Corps' Section 404 program to the extent that the opinion is read as an invalidation of the administrative definition of "waters of the United States."

a portion of its property. Without completing the application and without waiting for the Corps' decision on its request for a permit, Riverside commenced fill activity. When Riverside refused to comply with a cease and desist order issued by the Corps, the United States initiated this action in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside's unauthorized filling of wetlands. Riverside defended its actions by asserting that none of its property was subject to Clean Water Act jurisdiction. Following evidentiary hearings, the district court (then-District Judge Cornelia Kennedy) entered a preliminary injunction and later a permanent injunction prohibiting further filling activity on that portion of the property below the elevation of 575.5 feet until a Corps permit was obtained.

The district court found that the area subject to the injunction was an "adjacent wetland" under the Corps' 1975 interim final regulations.<sup>6</sup> This "wetlands" area is contiguous to Black Creek, a navigable water and tributary of Lake St. Clair. App., *infra*, 23a. It was undisputed that Riverside's property is predominantly vegetated with cattails, marsh grasses, and other wetland plants—*i.e.*, vegetation that is typically adapted for life in saturated soil conditions. *Ibid.* The district court found that, except for periodic surface water inundation from their overflow, the nearby water bodies (Black Creek, Clinton River, and Lake St. Clair)

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<sup>6</sup> The relevant interim final regulation provided (33 C.F.R. 209.120(d)(2)(h) (1976)): "'Freshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In relevant part, the final regulation eliminated the words "periodically inundated" and substituted "inundated or saturated by surface or ground water at a frequency and duration sufficient to support \* \* \* [aquatic vegetation]" (33 C.F.R. 323.2(c)). See page 6, *supra*.

are not the cause of the saturated conditions that support the wetlands vegetation found on Riverside's property (*id.* at 25a).<sup>7</sup> Instead, the district court found that the growth of the wetlands vegetation was principally caused by saturation associated with the type of soil found on the property—the soil drains poorly, resulting in a high water table and water on or near the surface (*id.* at 24a-25a). The record reflects that Riverside's property is part of a larger undeveloped area that has exhibited the wetlands characteristics of moisture and vegetation for decades. See, e.g., 1/15/77 Tr. 89, 121-122, 126-127, 134, 158, 185; 1/17/77 Tr. 4-7, 9, 14-15, 29-33. The environmental functions of the area were described by experts as providing habitat for muskrats and birds and furnishing food resources for fish in Lake St. Clair. 1/15/77 Tr. 52-56, 131, 158, 173-174; 1/17/77 Tr. 47, 61.

Having found that Riverside's property is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction" (33 C.F.R. 209.120(d)(2)(h) (1976)), the district court separately considered the requirement of "periodic inundation" found in the 1975 interim final regulation (*ibid.*). The court had considerable difficulty with this aspect of the regulation (which has since been eliminated to avoid confusion), but ultimately concluded that "periodic" required "more than five" floods (App., *infra*, 31a) and found that the elevation of 574.9 feet

<sup>7</sup> This finding was based on the district court's conclusion that there is no hydrologic connection between Riverside's property and the nearby water bodies (App., *infra*, 32a-37a). In context, however, it is clear that the finding refers to the absence of an underground connection by which water flows from those water bodies to the property. The court made no findings on the reverse question whether surface water drains from the property to the water bodies; the record suggests that it does because the property slopes toward Black Creek. See 1/21/77 Tr. 59, 86; DX 33.

had been surpassed by flooding on six "occurrences" in the last 80 years (*id.* at 30a). By adding half a foot to account for normal monthly fluctuation, the court arrived at its conclusion that Riverside's property below the elevation of 575.5 feet was a "wetland" subject to the Corps' jurisdiction (*id.* at 31a).

Riverside appealed. On motion of the United States, the court of appeals remanded the case to the district court for consideration of the effect of the Corps' 1977 revised final regulations. District Judge Gilmore applied the new regulations to the facts found by Judge Kennedy and again concluded that the area was an adjacent wetland under the regulations. The court permanently enjoined Riverside from filling without a permit. App., *infra*, 42a-44a. Riverside appealed anew.

3. The court of appeals reversed, holding that Riverside's property was not a "wetland" under the 1977 regulations and was not subject to the Corps' jurisdiction under the Clean Water Act (App., *infra*, 1a-19a). The court held that the Corps' jurisdiction over "wetlands" is limited to areas in which aquatic vegetation is caused by frequent flooding from adjacent navigable waters. Applying this test, the court concluded that Riverside's property was not a "wetland" for jurisdictional purposes because inundation by the periodic flooding from adjacent water bodies had not been sufficiently frequent to be the cause of the aquatic vegetation found on the property. App., *infra*, 10a-12a.

The court of appeals initially characterized its "frequent flooding" test as an interpretation of the Corps' revised definition of "wetlands," 33 C.F.R. 323.2(c). The court stated (App., *infra*, 10a):

The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inunda-

tion on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Although the court quoted a portion of the pertinent regulation at several points in its opinion (App., *infra*, 10a, 11a, 15a), nowhere did it discuss the regulation's applicability to areas characterized by a prevalence of aquatic vegetation that is attributable to saturated soil conditions or ground water (33 C.F.R. 323.2(c)). Instead, the court held that the regulation requires "frequent flooding by waters flowing from 'navigable waters' as defined in the Act" (App., *infra*, 15a).

The court reasoned that its narrow interpretation of the regulation was necessitated by what it perceived as both statutory and constitutional constraints on the Corps' jurisdiction. App., *infra*, 13a-16a. Because the CWA extends jurisdiction to "waters of the United States," the court questioned whether Congress intended to regulate "wetlands" at all. *Id.* at 13a (emphasis added). In addition to its view that Congress may not have intended to extend jurisdiction over the property at issue, the court reasoned that its narrow construction was required to avoid the potential problem of an unconstitutional taking (*id.* at 14a-15a).

The government petitioned for rehearing en banc. The petition was denied, but the panel expanded its initial opinion to make clear its view that the Clean Water Act itself, in addition to the Corps' regulation, does not authorize federal jurisdiction over "wetlands" not caused by "frequent flooding" from adjacent navigable waters (App., *infra*, 20a-21a). The government's interpretation of the Clean Water Act, which is reflected in the Corps' regulations, was rejected as "over broad and

inconsistent with the language of the Act in question" (*id.* at 21a).<sup>8</sup>

#### **REASONS FOR GRANTING THE PETITION**

The decision below conflicts with the decisions of other circuits, is flatly inconsistent with the intent of Congress, and stands as a serious obstacle to the achievement of Congress's goals. Though the statutory phrase, "waters of the United States," may at first blush be deceiving, even a cursory review of the legislative history of the Clean Water Act, both as it was passed in 1972 and as amended in 1977, quickly and conclusively dispels any notion that Congress intended the Section 404 program to be limited by the traditional concepts of navigability resurrected by the court of appeals. The court's opinion is truly remarkable for its failure to address Congress's purposes in enacting the CWA, the Act's legislative history, or the several decisions of other circuits that have uniformly recognized

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<sup>8</sup> During the pendency of the appeal in this case, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre area filled between May 26, 1976, and January 16, 1977. The after-the-fact permit request was denied based on the Corps' conclusion that "the existing fill has had an adverse impact on the wetland and its function as a flood-water storage area, water quality enhancement basin and fish and wildlife habitat."

In addition to its request for after-the-fact approval of its earlier fill, Riverside sought permission to fill 30.6 more acres. The State of Michigan denied a state permit for this proposed fill. Accordingly, the Corps also refused to approve the proposed work because its regulations (see 33 C.F.R. 325.8(b)) provide that permits will not be granted by District Engineers in the absence of all necessary state and local approvals. Riverside did not seek judicial review of the Corps' permit denials, and the court of appeals did not address the subject, presumably because its ruling on the scope of the Corps' jurisdiction made it unnecessary for Riverside to obtain any Corps permits.

the broad sweep of federal regulatory jurisdiction that Congress intended.

Because the court of appeals' "frequent flooding" test will release millions of acres of wetlands from federal jurisdiction, it threatens adverse effects on water quality, wildlife, and fish resources resulting from the unregulated discharge of dredged or fill material into wetlands. Further, the court of appeals' decision undermines Clean Water Act enforcement by creating inconsistency on a national level and by establishing a jurisdictional test that neither landowners nor regulators can readily apply. Accordingly, review by this Court is warranted.

1. a. The Clean Water Act totally restructured the Nation's efforts to combat water pollution by adopting a strategy of controlling pollution at the point of its discharge. See generally *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). Congress recognized that restricting jurisdiction over water pollution to those relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act.<sup>9</sup> Thus, Congress intentionally deleted the word "navigable" from the Act's definition of "navigable waters" and rejected the Corps' traditional definition of navigable waters as ill-suited to the Act's water quality goals. The Conference Committee explained that (118 Cong. Rec. 33699 (1972) (emphasis added)):

The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency

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<sup>9</sup> The Senate report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)): "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

*determinations which have been made or may be made for administrative purposes.*[<sup>10</sup>]

See also H.R. Rep. 92-911, 92d Cong., 2d Sess. 131 (1972) ("One term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly."). Congress thus clearly understood that concepts of navigability have nothing to do with combatting water pollution and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" directly tied to water quality concerns.

Whatever doubt may have existed on this score when the Act was first passed in 1972 was completely laid to rest by the 1977 amendments to the statute. The regulations promulgated by the Corps in response to *NRDC v. Callaway*, *supra*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.<sup>11</sup> An amendment to limit the geographic reach of the Section 404 program to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee. Instead of re-

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<sup>10</sup> Regulation of wetlands in order to address environmental problems is undoubtedly within Congress's power under the Commerce Clause. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); *United States v. Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979).

<sup>11</sup> *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

stricting the geographic reach of Section 404, Congress amended the statute by exempting certain *activities*—most notably, certain normal agricultural and silvicultural activities—from the Act's permit requirements. See 33 U.S.C. 1344(f).<sup>12</sup>

The legislative history of the 1977 amendments clearly demonstrates Congress's recognition of the importance of wetlands and its intention to protect them under the Clean Water Act regulatory program.<sup>13</sup>

<sup>12</sup> Congress also added several other provisions to Section 404, including provisions designed to streamline the permit process and to allow states to administer portions of the program. Those amendments, while not pertinent to the issue in this case, demonstrate that Congress thoroughly reexamined Section 404 when it passed the 1977 amendments. In these circumstances, Congress's decision not to alter the geographic reach of the section takes on added significance. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

<sup>13</sup> For example, Senator Muskie, one of the primary sponsors of the CWA, explained (123 Cong. Rec. 26697 (1977)):

There has been considerable discussion of section 404 of this act, much of which has been related to the suspicions and fears with respect to that section, and little of which has been related to substantive solutions to real problems while providing an adequate regulatory effort to assure some degree of wetlands protection. There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chafee).

When Congress rejected the attempt to limit the reach of Section 404, it was well aware that the Corps' 1977 regulations asserted jurisdiction over all adjacent wetlands and some isolated wetlands. See, e.g., S. Rep. 95-370, 95th Cong., 1st Sess. 75 (1977); 123 Cong. Rec. 38967-38968 (1977) (remarks of Rep. Roberts); 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). Moreover, Congress specifically referred to "adjacent" "wetlands" as regulated waters in one of the amended Section 404 provisions, 33 U.S.C. 1344(g)(1). Congress's use of this regulatory term of art was an affirmative endorsement of the Corps' interpretation of the scope of its jurisdiction under Section 404. See *Bob Jones University v. United States*, No. 81-3 (May 24, 1983), slip op. 24-26; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969).

The court of appeals' failure to consider the legislative history was improper. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976). This is particularly so because the legislative history so strongly supports the validity of the Corps' interpretation of the statute as reflected in the 1977 regulations. This Court has repeatedly emphasized that reviewing courts are precluded from substituting their judgment for that of an agency, particularly with respect to technical matters or to a determination, including jurisdiction, that has been assigned primarily to the agency administering a statute. See, e.g., *Chevron U.S.A. Inc. v. NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-131 (1944).<sup>14</sup> Had the

<sup>14</sup> The fact that the Corps initially took a narrower view of its jurisdiction under the CWA is of no moment in this case. The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op.

court below followed these principles, it would have recognized that its self-created "frequent flooding" test bears no relationship to the water quality concerns that motivated Congress. The positive contributions of wetlands to the integrity of the aquatic system (see page 3, *supra*) are in no way dependent on frequent inundation from overflowing streams or lakes.<sup>15</sup>

b. The court of appeals seriously erred in concluding that its narrow interpretation of Section 404 jurisdiction

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Att'y Gen. No. 15, at 1 (Sept. 5, 1979). As previously noted (see pages 4-5 & n.3, *supra*), EPA has consistently supported a broad interpretation of the scope of Clean Water Act jurisdiction.

<sup>15</sup> Relatively little need be said respecting the court of appeals' interpretation of the Corps' regulation defining "wetlands" (33 C.F.R. 323.2(c)). The court's interpretation was plainly inconsistent with the regulatory language. By virtue of its singular focus on flooding, the court totally ignored the words "saturated" and "ground water" found in the "wetlands" definition. As the preamble to the Corps' regulations explains, "inundation or saturation [of a wetland] may be caused by either surface water, ground water, or a combination of both." 42 Fed. Reg. 37128 (1977). Nowhere in the regulations is there a suggestion that the water inundating or saturating an area must flow from a lake or stream. Furthermore, the court of appeals failed to heed the well-established principle that an agency's interpretation of its own regulations is entitled to deference by a reviewing court, particularly where, as here, technical expertise is involved. E.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 556 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

In short, the prevalence of wetland vegetation attributable to saturated soil conditions brings Riverside's property within the regulatory definition of wetlands. Because the property is adjacent to Black Creek, it falls within the regulatory definition of "waters of the United States," 33 C.F.R. 323.2(a) and (d). The court's concern (App., *infra*, 21a) that the Corps was attempting to regulate "low lying backyards" was entirely misplaced. Although the wetlands vegetation on Riverside's property is not attributable to inundation from the adjacent navigable waters, it is undisputed that the property serves precisely the type of critical ecological functions that Congress intended to protect. See page 8, *supra*.

tion was required by the Takings Clause of the Fifth Amendment. The fundamental flaw in the court's "taking" analysis was its erroneous assumption that the mere assertion of Section 404 jurisdiction amounts to the prohibition of "any development or change of such property." App., *infra*, 14a. In fact, however, the scope of Section 404 jurisdiction determines nothing more than whether the owner of a wetland must obtain a permit before discharging pollutants onto his property. Moreover, the statute and the implementing regulations expressly contemplate the granting of permits in appropriate circumstances, see 33 U.S.C. 1344(b); 33 C.F.R. Pts. 320, 323; 40 C.F.R. Pt. 230, and, even if a permit is denied, it does not follow that all economically viable uses of the property will be foreclosed. See *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983); *United States v. Byrd*, 609 F.2d 1204, 1211 (7th Cir. 1979); cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981).<sup>16</sup>

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<sup>16</sup> The sole authority for the court of appeals' "taking" analysis, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (App., *infra*, 14a-15a), nowhere suggests that a narrow view of federal regulatory jurisdiction is required to avoid a taking "problem." In fact, *Kaiser Aetna* supports the opposite conclusion. There, this Court explicitly acknowledged that a privately-owned lagoon converted by its owners into a navigable water was subject to federal regulatory jurisdiction. 444 U.S. at 174, 179. It was only the government's attempt to require the owners to provide the public with free access to the lagoon that amounted to a "taking" for which compensation would be due because the access requirement would have deprived the owners of "the 'right to exclude,' so universally held to be a fundamental element of the property right" (*id.* at 179-180 (footnote omitted)). Subsequently, the Court refused to apply *Kaiser Aetna* to a land use regulation that, like the permit requirements of the Clean Water Act, did not extinguish any "fundamental attribute of ownership." *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

A "taking" of private property cannot arise from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. See, e.g., *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-28; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, 149 (1974); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Thus, the court of appeals clearly erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.<sup>17</sup>

Finally, the taking analysis in any particular case is fundamentally factual. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). In a Section 404 case, for example, the court would have to determine, inter alia, whether denial of a permit deprived the landowner of all economically viable uses of his land. See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184, 1191-1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). The court of appeals conducted no such inquiry in this case, and thus its taking concerns were wholly speculative.<sup>18</sup>

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<sup>17</sup> Of course, a landowner may also obtain judicial review, pursuant to the Administrative Procedure Act, 5 U.S.C. 702, of a Corps decision to deny a permit application. See, e.g. *Buttrey v. United States*, 690 F.2d 1170, 1183 (5th Cir. 1982), cert. denied, No. 82-1303 (May 16, 1983); *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982).

<sup>18</sup> As noted (see note 8, *supra*), Riverside applied for and was denied a permit while this case was pending in the court of appeals. But the court of appeals did not decide whether the per-

2. Although it acknowledged in a footnote devoid of any discussion (App., *infra*, 13a n.4) that the Fifth Circuit has recently upheld the Corps' definition of wetlands (see *Avoyelles Sportsmen's League v. Marsh*, *supra*), the court below seemingly approached the issue before it as though it were a question of first impression. In fact, it is not, and, what is more, every other circuit to address the matter (either in the context of Section 404 or of other sections of the CWA that apply to "waters of the United States") has concluded that Congress intended in the CWA to assert jurisdiction over the Nation's waters to the full extent of its power under the Commerce Clause and that the implementing regulations faithfully reflect that intent. See, e.g., *Utah v. Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 914-916; *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Byrd*, 609 F.2d at 1209-1211; *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 243 (4th Cir. 1979).

These courts have all recognized that Congress's purposes, described at pages 3, 12-13, *supra*, would be severely frustrated by an interpretation of "waters of the United States" that excluded areas, including wetlands, the destruction or pollution of which could threaten the purity of the more traditional waters to which the court below confined its concern. The result of this conflict in the circuits, unless resolved, will be inconsistent appli-

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mit denial was proper or whether it effected a taking in the circumstances of this case, nor could the court have considered these questions inasmuch as Riverside never challenged the denial of the permit.

cation of the nationwide Section 404 program, to the detriment of landowners and regulators alike. See pages 21-22, *infra*.<sup>19</sup>

3. a. The court of appeals' decision threatens to cause significant environmental damage by allowing unregulated discharges into critical wetlands. In deciding whether to grant or deny a permit request, the Corps carefully reviews the environmental risks posed by dumping dredged or fill material into a wetland within its jurisdiction pursuant to criteria (40 C.F.R. Pt. 230) established by the EPA under Section 404(b) of the Act, 33 U.S.C. 1344(b). In the permit review process, the ecological importance of the particular wetland and the impacts of the proposed activity are evaluated, as well as the need for the project; permits may be granted, denied, or conditioned to reduce adverse consequences of the proposal. On average, two-thirds of all permits that are granted include conditions requiring best management practices or other measures to mitigate adverse effects on water resources, including wetlands. *Wetlands* 12. The permit review process, therefore, prevents the unnecessary pollution or destruction of wetlands important to the maintenance of water quality. See 33 U.S.C. 1344(b); 40 C.F.R. 230.10; 33 C.F.R. 320.4(a) and (b). The court of appeals' contraction of jurisdiction wholly pretermits this review process and will inevitably lead to water pollution and destruction of wetlands that would not otherwise occur.

<sup>19</sup> In addition, the problem is compounded by the fact that the regulations at issue were initially promulgated in response to a court order. See page 5, *supra*. Even if we thought that the decision below were correct, which we do not, it seems doubtful that the Corps could amend its regulations to conform to the court of appeals' ruling without risking additional litigation challenging any new regulations as inconsistent with the mandate of *NRDC v. Callaway*, *supra*. Thus, the conflict in the circuits cannot be resolved administratively.

Indeed, the Corps has estimated that the court of appeals' "frequent flooding" test will release 2,128,000 acres of wetlands within the Sixth Circuit from the protection of the Clean Water Act; this acreage amounts to 48% of the wetlands previously thought to be within the Corps' jurisdiction within the Sixth Circuit.

b. Effective implementation of the Section 404 regulatory program will be substantially undermined by the court of appeals' decision. Approximately 11,000 Section 404 permit applications are filed each year. These applications are processed by the Corps' 40 district offices throughout the country. Due to the magnitude of the program and its decentralized administration, effective implementation of Section 404 is highly dependent on voluntary compliance by landowners, which in turn requires a clear, easily-applied jurisdictional test. In contrast to the relative ease with which the jurisdictional test set forth in the Corps' regulations can be applied to particular parcels of land, however, the court of appeals' "frequent flooding" test is dependent upon highly technical, hydrologic data not readily accessible to landowners or regulators. As a practical matter, it will be difficult for landowners and regulators to isolate the inundation required by the court's decision from other factors affecting the wetness of an area. In effect, the court's decision requires a potential permit applicant to hire hydrologists to assess the existence, the frequency, and the direction of the flow of water. In these circumstances, public cooperation in the voluntary implementation of the program will inevitably be jeopardized. For the same reasons, the Corps' ability to enforce Section 404, by detecting violations and advising landowners of permit requirements, will be unduly complicated.<sup>20</sup> Accordingly, clarification of the appro-

<sup>20</sup> The court of appeals' decision creates other cumbersome management problems for the Corps. The conflict between the court's decision and the Corps' regulations, fully applicable in

priate test for wetlands jurisdiction is required for the benefit of landowners and regulators alike.

#### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

other circuits, will require the Corps to administer a nationwide program using inconsistent standards. Because the Corps' district offices that manage the permit program are divided by watershed, eight such offices overlap a Sixth Circuit state and a state in another circuit. Consequently, regulators in those eight offices will be forced to apply both the Corps' regulations and the court of appeals' "frequent flooding" test.

#### **APPENDIX A**

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#### **UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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Nos. 81-1405

81-1498

**UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE, CROSS-APPELLANT,**

*v.*

**RIVERSIDE BAYVIEW HOMES, INC.,  
A MICHIGAN CORPORATION, AND  
ALLIED AGGREGATE TRANSPORTATION COMPANY,  
A MICHIGAN CORPORATION,  
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.**

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#### **ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**

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Decided and Filed March 7, 1984

Before: MERRITT and MARTIN, Circuit Judges;  
WEICK, Senior Circuit Judge.

**MERRITT**, Circuit Judge. This is an environmental case concerning "wetlands" and the jurisdiction of the United States Army Corps of Engineers over them. The government claims that defendants, Riverside Bayview Homes, Inc., and Allied Aggregate Transportation Company, violated section 301(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(a) (1976), and regulations concerning "wetlands" purportedly issued under that Act. The claimed violation

(1a)

occurred when the defendants deposited fill material on Riverside's land, which the government asserts is a "wetland," without obtaining a permit from the Corps of Engineers as required by the Act. Judge Cornelia Kennedy, sitting as a District Judge, issued a permanent injunction prohibiting further filling on a large portion of Riverside's property and a declaratory judgment holding one of the Corps regulations unconstitutional. Both parties then appealed.

On the first appeal, this Court remanded the case for further proceedings in the District Court in light of a new regulation promulgated by the Corps. That regulation, found at 33 C.F.R. § 323.2(c) (1983), specifically altered the definition of "wetlands" relied upon by Judge Kennedy in the original District Court proceeding. We conclude that the District Court on remand erred in interpreting the new definition of wetlands to include defendant's property and in continuing the permanent injunction under the new regulation. We also vacate as moot the declaratory judgment issued by the District Court in the first proceeding.

#### I. THE LAND IN QUESTION

Riverside owns approximately eighty acres of undeveloped land north of Detroit in Harrison Township, Michigan, which it had planned to develop for housing. It is located in a suburban area approximately a mile west of Lake St. Clair and south of South River Road, roughly paralleling the Clinton River. Its southern boundary is separated from the man-made Savan Drain by two ten-acre parcels. Its western boundary is formed by Jefferson Avenue, a heavily travelled road.<sup>1</sup>

Riverside's property comprises one sixty-acre parcel and a partially adjoining twenty-acre parcel. The sixty

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<sup>1</sup> For a pictorial depiction of the property, see the Appendix to this opinion.

acres running along Jefferson Avenue were actively farmed in the past. In 1916, the sixty-acre tract was platted as a subdivision, and storm drains and fire hydrants were installed. The remaining twenty-acre parcel was neither platted nor improved. In the early and mid-1950's, some efforts were made by the owner to develop the platted subdivision. In 1960, the newly-formed Riverside Corporation bought the property. According to Riverside, its efforts to develop the property along with the surrounding area during the 1960's were stymied by an adjacent property owner who blocked an effort to reroute a street dissecting the property, and by a local zoning ordinance which forced it to fill the property to a specific elevation.

In 1973, unprecedented high water levels on the Great Lakes, including Lake St. Clair, located a mile east of the Riverside land, prompted emergency action by Harrison Township and the Corps of Engineers to protect area homes and businesses from water damage. Emergency measures included building a semicircular dike which dissected the twenty-acre parcel and extended southeast across the sixty-acre tract, and filling a ditch along Jefferson Avenue with dirt, thereby destroying the drainage on the western border of the property.

In furtherance of its development plans, Riverside contracted with Allied Aggregate Transportation Company in the fall of 1976 to have dirt fill hauled to the property. It was unclear whether or not the land would be subject to the Corps' regulatory jurisdiction. Accordingly, a Riverside stockholder met with Corps personnel to discuss whether a permit must be obtained in order to proceed with filling the land. Riverside submitted an incomplete application for a permit in November, 1976.

Before the permit application had been acted on by the Corps, Riverside began placing fill on the property

north of the dike. On December 22, 1976, Riverside was ordered by the Corps to cease and desist from further filling. When Riverside continued to fill, the Corps asked the United States Attorney to bring this enforcement proceeding.

On January 7, 1977, the District Court entered a temporary restraining order prohibiting Riverside and Allied from engaging in further filling, pending a full evidentiary hearing. After that hearing, which encompassed seven days of testimony, Judge Kennedy issued an opinion granting the government's motion for a preliminary injunction. Judge Kennedy also held unconstitutional a Corps regulation requiring the processing of an application for a permit to be postponed once the United States Attorney has begun enforcement proceedings. On June 20, 1979, the District Judge issued the court's final judgment holding a large portion of Riverside's land to be a wetland subject to Corps regulation under the Federal Water Pollution Control Act. Judge Kennedy permanently enjoined further filling on that portion of the property until the Corps issues a permit to Riverside. At the same time, she issued an order holding defendants in contempt of court because they had continued to fill the property. The defendants were ordered to remove the fill, which they have apparently done. Since that time, Riverside's application for a Corps permit has been processed and denied.

## **II. THE WETLANDS DETERMINATION**

### **A. Statutory and Regulatory Background**

The Federal Water Pollution Control Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1976). The Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Section 301 of the Act states that, except as permitted under certain exceptions, "the discharge

of any pollutant by any person shall be unlawful." *Id.* § 1311(a). One of the express exceptions to this rule is contained in section 404, 33 U.S.C. § 1344, which authorizes the Corps to issue permits for the disposal of dredged or fill materials into "navigable waters."

The Act contemplates that applications for section 404 permits are to be evaluated by the Corps under regulations developed jointly by the Environmental Protection Agency and the Corps. *See id.* § 1344(b); 40 C.F.R. § 230 (1983). These regulations are supposed to identify the factors to be used in determining whether filling will have an adverse impact on water quality. A person who fills or otherwise discharges pollutants into "navigable waters" without a permit subjects himself to civil or criminal penalties. *See* 33 U.S.C. § 1344(h)(1)(G) (violations of permit program entail "civil and criminal penalties and other ways and means of enforcement").

The "navigable waters" which the Federal Water Pollution Control Act was meant to protect are defined in the Act as "the waters of the United States, including the Territorial seas."<sup>2</sup> *Id.* § 1362(7). The Act does not mention or define "wetlands." The Corps and the EPA, however, developed regulations pursuant to the Act covering areas denominated as "wetlands" as well as the congressionally specified "navigable waters." These regulations, including the permit procedures noted above, seek to prohibit tampering with wetlands without the express permission of the agencies.

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<sup>2</sup> The term "Territorial seas" is defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." *Id.* § 1362(8).

### B. The Wetlands Definition

At the time that this action was initially brought, the Corps regulation defined wetlands and provided that a permit must be obtained for filling of

Freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other [sic] navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are [1] *periodically inundated* and that [2] are normally characterized by the prevalence of *vegetation that requires saturated soil conditions* for growth and reproduction.

33 C.F.R. § 209.120(d)(2)(i)(h) (1976) (emphasis added).

The question before the District Court in the initial proceeding was whether the Riverside land possessed the characteristics set forth in the above definition and thus should be classified as a wetland subject to the Corps' regulatory jurisdiction. Judge Kennedy found that the land was contiguous to a navigable water, Black Creek, which is a tributary of Lake St. Clair. Furthermore, she found that because of the type of soil found on the land, the unfilled Riverside property was "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." These two aspects of the wetlands definition having been satisfied, the District Court focused on the question of whether the land was "periodically inundated."

Judge Kennedy's resolution of this issue was based on what she admitted was an unavoidably "arbitrary" interpretation of the term "periodic" as it is used in the Corps regulation. She accepted the standard dictionary definition, "flooded," as the meaning of "inundated," but was compelled to rely on a rough statistical plotting of the potential for flooding of the Riverside land in order to determine whether it was "periodically inundated," or flooded on a "periodic" basis.

Judge Kennedy found that the Riverside land was rarely if ever inundated. From testimony concerning Lake St. Clair which established that a water level of 575.0 feet would be reached or surpassed only about two percent of the time, she concluded that it was difficult to ascertain whether the Riverside land south and east of the contour line of 575.5 feet was ever flooded. She explained:

The mean of the elevations on the south and east of defendants' property is 574.6, ranging from 575.70 to 574.45. Using the monthly mean level of Lake St. Clair . . . and adding six inches, the normal variation, it is immediately apparent that *there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been true most of the time.*

Opinion and Order Granting Motion for Preliminary Injunction in Part at 6 (emphasis added). Judge Kennedy noted that the high-water levels in the period from 1973-75 were unprecedented. From this and other statistical information, she extrapolated that "there have been periods in only 14 of the 80 years of recorded lake levels in which the monthly mean inundated the property, — or, 17% of the time," and that "[s]ome of the higher elevations have been inundated only during the last recent unprecedented high water or *have never been inundated.*" *Id.* (emphasis added).

Despite these misgivings, Judge Kennedy found that there was sufficient evidence from which to conclude that the land had been "inundated." Accordingly, she then turned to the question of whether that inundation was "periodic," observing that "[t]he Court is left in the unenviable position of having to define 'periodic' without knowing the reason for the adoption of this standard." *Id.* at 7. She found that the Riverside land at the contour line of 575.5 feet above sea level had been inundated on four to six occasions in the past eighty years.

Acknowledging that there was no precedent for her analysis, Judge Kennedy reasoned:

If treating the years 1972-1975 and 1952-1953, as one occurrence, then the lake levels have exceeded 575 feet only four times (1928, 1952-1953, 1969 and 1972-1975). If the level of 574.9 feet were to be considered, the number of occurrences would increase to six . . . [I]t is clear that determining the level at which the inundation would be considered "periodic" is difficult and perhaps somewhat arbitrary. The Court must choose the point at which an occurrence became periodic. It has selected more than five. It therefore determines that the appropriate level is 575 feet, plus the half-foot of normal monthly fluctuation [of the mean high water level of Lake St. Clair] above the mean.

*Id.* On this basis, the District Court enjoined Riverside from placing fill below the 575.5 foot contour line without first obtaining a Corps permit. Under this ruling, some eighty percent of the land was denominated as a "wetland," and therefore was not usable as contemplated by the landowner without the government's permission.

In 1977, after Judge Kennedy's initial permanent injunction was issued, the Corps wetlands definition on which the ruling was based was repealed and replaced. Wetlands are now defined as

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in [saturated] soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1983).

In the preamble to the new regulations, the Corps explained that the wetlands definition had been changed "to eliminate several problems and achieve

certain results." The reference to "periodic inundation" was deleted because

[m]any interpreted that term as requiring inundation over a record period of years. Section 404 is intended to regulate discharges of dredged or fill material into the aquatic system *as it exists*, and not as it may have existed over a record period of time.

42 Fed. Reg. 37128 (July 19, 1977) (emphasis added). The preamble goes on to indicate that the new definition "pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation." *Id.*

For similar reasons, the Corps also eliminated the term "normally" in the wetlands definition, replacing it with the phrase, "and that under normal circumstances do support." The preamble notes that the term "normally" was used in the original version of the definition "to respond to those situations in which an individual would attempt to eliminate the permit review requirement of Section 404 by destroying the aquatic vegetation, and to *those areas that are not aquatic but experience an abnormal presence of aquatic vegetation.*" *Id.* (emphasis added). Significantly, the preamble notes that it is still the case under the new regulation that "[t]he abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." *Id.*

### III. APPLICATION OF WETLANDS REGULATIONS TO FACTS

The changes in the Corps wetlands definition meant that the task before Judge Gilmore was essentially that of applying this new definition to the facts as found by Judge Kennedy in the earlier proceeding to determine whether the Riverside property below the elevation of 575.5 feet above sea level is or is not a wetland. Our order remanding this case to the District Court for fur-

ther examination in light of the new regulation did not make the nature of the inquiry clear, however. We did not point out to Judge Gilmore precisely what we expected him to do.

We should have directed the District Court to consider the voluminous evidence from the seven days of testimony given earlier and to make a finding as to whether the Riverside property to the south and east of the contour line of an elevation of 575.5 feet, *as it exists now*, should be classified as a wetland. Instead, in the absence of clear directions, the District Judge on remand simply found from a common-sense reading of the new language that the amended regulation was "broader than its predecessor." Presumably, his reasoning from there was that, since Judge Kennedy had found that the property was "periodically inundated," and since it does support some aquatic vegetation, it must therefore be inundated "at a frequency and duration sufficient to support, and that under normal circumstances [does] support" wetlands vegetation.

It does not necessarily follow, however, that because an area has been flooded five times in more than eighty years that, "as it exists" now, it is "inundated at a frequency and duration sufficient to support and that under normal circumstances [does] support" wetlands vegetation. The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of such vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Were this not so, then areas which inexplicably support some species of aquatic vegetation, but which are not normally inundated, would fall within the wetlands definition. Such a perverse result could not have been what the Corps contemplated in promulgating the regulation. Indeed, as noted earlier, the Corps expressly adverted to the situation of "areas that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasized that such lands were not intended to be covered by the regulations.

Turning now to the facts as found by Judge Kennedy, and applying our interpretation of the new wetlands definition to those facts, we conclude that the Riverside land is not a wetland. We note at the outset that Judge Kennedy did not find that the land, "as it exists" now, is inundated. Nor is there evidence in the record to support such a finding. After examining the evidence, Judge Kennedy found that the land had only been flooded on four to six occasions in the eighty years of recorded history of the area. Although flooding of such infrequency might properly be called "periodic," it cannot fairly be said that it describes the land "as it exists."

Judge Kennedy did find that, quoting from the old regulation, the Riverside land was characterized "by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Significantly, however, she found that the source of this vegetation was the type of soil found on the property and not the few instances of flooding. The evidence supports her determination that the infrequent inundation caused by the adjacent navigable water, Black Creek, was not the cause of the wetland vegetation. Thus she did not find, and on the evidence presented could not have found, that the land, as it exists now, is "inundated at a frequency and duration sufficient to support, and that under normal circumstances [does] support"

the wetlands vegetation. Nor did she consider or make any findings concerning the question whether the Riverside land fits the Corps definition of an area which is technically not a wetland, because it is not inundated, but which experiences an abnormal presence of aquatic vegetation.<sup>3</sup>

In the absence of evidence that the property as it exists now is frequently flooded and that the flooding causes aquatic vegetation to grow there, the government's case is insufficient to justify a classification of this property as a wetland subject to the jurisdiction of the Corps of Engineers. The injunction is therefore vacated.

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<sup>3</sup> There was evidence adduced during the evidentiary hearing which strongly indicated that the Riverside land may fit within this category of land which is "not aquatic but experience[s] an abnormal presence of aquatic vegetation." Not only was the land farmed for many years, it has been established that there are many species of vegetation growing there now that could not be classified as purely wetlands vegetation. For example, it is significant that on cross-examination by Riverside's attorney, the government's main witness admitted that the "only positive knowledge" he had about the vegetation on the land was that there were cattails. See Government's App. at 75. Furthermore, this witness testified that in addition to cattails, phragmites, marsh grasses and other wetland-type vegetation, he discovered ash, red maple, cottonwood, and sedge on the property. He admitted that these were not necessarily wetland-type vegetation. We do not find that Judge Kennedy's finding that there was a "prevalence" of wetland-type vegetation on the property was clearly erroneous; rather, we simply note that her finding to that effect was based on the old regulation and did not go to the issue of whether the presence of wetland-type vegetation on the land was "abnormal" in the sense that it was supported not by inundation but by unusual soil conditions.

#### IV. NARROW INTERPRETATION OF "WETLANDS" REGULATION NECESSARY

In deciding that the District Court erred on remand in failing properly to assess the impact of the new wetlands definition upon Judge Kennedy's earlier wetlands determination, we construe the regulation containing the definition somewhat narrowly in order to avoid serious questions concerning the validity of the definition itself under the Act. In delegating authority to the Corps under the Federal Water Pollution Control Act, Congress defined the subject matter intended to be protected by the statute as the "navigable waters." Section 502(f) defines "navigable waters" as "waters of the United States including the Territorial seas." The language of the statute makes no reference to "lands" or "wetlands" or flooded areas at all.

Congress may, indeed, have meant to extend the protections of the Act beyond the straightforward definition it provided of "navigable waters."<sup>4</sup> The question, however, is how far away from "navigable waters" Congress contemplated that the regulations under the Act could drift. It is certainly not clear from the statute that the Corps' jurisdiction goes beyond navigable waters and perhaps the bays, swamps, and marshes into which those navigable waters flow. Neither is it clear that Congress intended to subject to the permit requirement inland property which is rarely if ever flooded. Nor is it clear that the statute was intended to cover a piece of property a mile inland from Lake St. Clair which has been farmed in the past and is now

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<sup>4</sup> We note that the Fifth Circuit has recently held that the Corps' wetlands definition is consistent with the intent of the Federal Water Pollution Control Act. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

platted and laid out for subdivision development with the fire hydrants and storm sewers already installed.

To prohibit any development or change of such property by the landowner raises a serious taking problem under the fifth amendment. It is well established that government regulation can effect a fifth amendment taking. The rationale, as stated by Justice Brennan, is that “[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.” *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). Recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court addressed a problem markedly similar to this one and declared:

Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of “navigable waters” as this Court has used that term in delimiting the boundaries of Congress’ regulatory authority under the Commerce Clause, . . . this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation.

*Id.* at 172 (citations omitted). In *Kaiser Aetna*, the Supreme Court found that the government’s attempt to create a public right of access to a pond which was improved so as to be capable of supporting navigation but had always been considered private property “goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking....” *Id.* at 178 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). The Court found the *Kaiser Aetna* petitioners’ interest in their dredged marina-style subdivision community which included Kuapa Pond “strikingly similar”

to that of owners of fast land adjacent to navigable water, like Riverside, noting that there was no doubt that “when the Government wishe[s] to acquire fast lands, it [is] required by the Eminent Domain clause of the Fifth Amendment to condemn and pay fair value for that interest.” *Id.* at 177. The Court concluded:

[I]f the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have [in developing it as a private subdivision] it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners’ agreement with their customers calls for an annual \$72 regular fee.

*Id.* at 180.

The parallels between *Kaiser Aetna* and this case are obvious and hardly require elaboration. We note only that we see a very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps, a problem we avoid by construing the regulation containing the amended wetlands definition as limited to lands such as swamps, marshes, and bogs that are so frequently flooded by waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the “waters of the United States.” See 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 45.11, at 33-34 (C. Sands ed. 1973) (discussing presumption of constitutionality of statutes).

Accordingly, we interpret the words “inundated at a frequency and duration sufficient to support, and that under normal circumstances [does] support [wetlands vegetation]” as set forth in the amended regulation to require frequent flooding by waters flowing from “navigable waters” as defined in the Act. The definition thus covers marshes, swamps, and bogs directly created by such waters, but not inland low-lying areas such as the

one in question here that sometimes become saturated with water.

#### V. THE DECLARATORY JUDGMENT

During the two and one-half years of litigation of the issue of the Corps' jurisdiction over Riverside's property, the Corps declined to process an application for a permit to fill the area in question. The agency was precluded by regulation from acting on Riverside's application because the United States Attorney had initiated enforcement proceedings after it was discovered that Riverside was engaged in unauthorized filling. The Corps regulation provides:

If the District Engineer refers a case to the local U.S. Attorney or if criminal and/or civil action is instituted against the responsible person for any unauthorized activity, the District Engineer shall not accept for processing any application for a Department of the Army permit until final disposition of the referral action and/or all judicial proceedings, including the payment of all prescribed penalties and fines and/or completion of all work ordered by the court. Thereafter, the District Engineer may accept an application for a permit; provided, that with respect to any judicial order requiring partial or total restoration of an area, the District Engineer, if so ordered by the court, shall supervise this restoration effort and may allow the responsible persons to apply for a permit for only that portion of the unauthorized activity for which restoration has not been so ordered.

33 C.F.R. § 326.4(e) (1982) (current version as amended at 33 C.F.R. § 326.3(c)(3) & n.2 (1983)).

Riverside asked the District Court in the initial enforcement proceeding to issue a declaratory judgment declaring this regulation to be unconstitutional as a de facto taking of Riverside's property. In a memorandum opinion, Judge Kennedy held that the postponement of processing of Riverside's application for a permit under

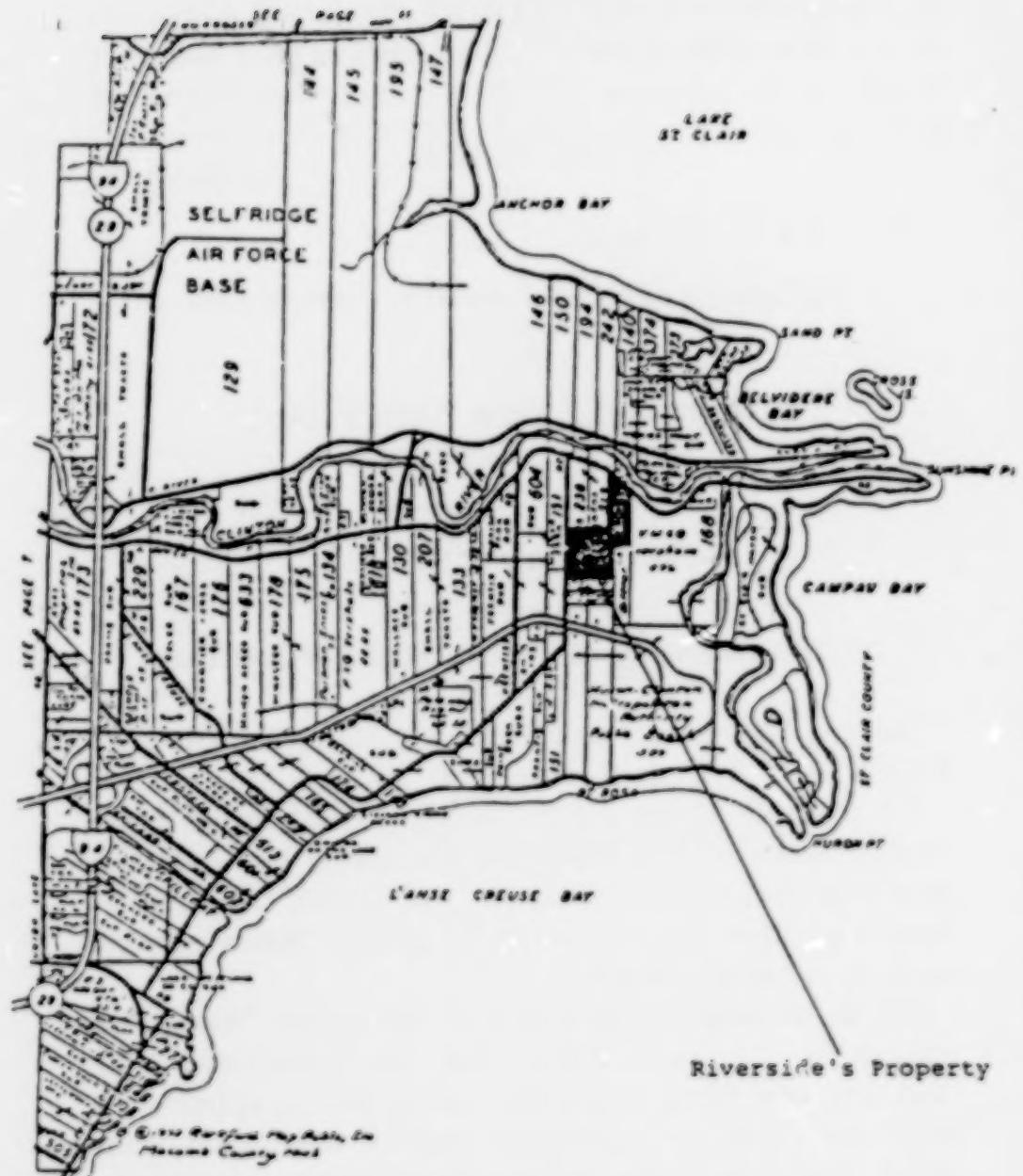
the regulation "effect[s] a quasi-taking of property unless and until a person relinquishes any right the person may have to engage in litigation with the Corps of Engineers." Opinion of the Court at 9. Moreover, Judge Kennedy held that the deferral was a sanction unauthorized by the section of the Federal Water Pollution Control Act which gives the Corps the authority to promulgate regulations to carry out its functions. *Id.*

Judge Kennedy interpreted the regulation as denying defendant "the right to litigate the constitutionality of a statute or regulation on peril of losing its rights to pursue its administrative adjudication remedies." See *id.* Apparently, she understood the regulation to compel the defendant to choose between litigating his claim that the regulation effects an unconstitutional taking of his property, and proceeding with his application for an after-the-fact permit which, if granted, would enable him to continue with his development project.

Riverside's opposition to the regulation postponing the permit process cannot alter the fact that nothing in the regulation now adversely affects its interest. We construed the Corps wetlands definition narrowly and concluded that Riverside's property is not a wetland and that, therefore, the Corps has no jurisdiction over it. Riverside is now free to develop its land as it wishes. Moreover, the challenged regulation has since been amended to suggest a strong presumption in favor of processing applications for after-the fact permits. See 33 C.F.R. § 326.3 & n.2 (district engineer shall accept application for after-the-fact permit for unauthorized filling unless state or local enforcement action is pending, and "[t]his exception to the general rule of accepting after-the-fact applications should be used on a limited basis, only for those cases which merit special treatment"). Therefore, the question is moot.

The problem before us clearly is not "capable of repetition, yet evading review." See *Moore v. Ogilvie*, 394

U.S. 814, 816 (1969) (case concerning burden placed on nomination process for statewide office was not moot but was "capable of repetition, yet evading review," because same restriction on plaintiff's candidacy that had adversely affected him in 1968 could do so in 1972 election); *International Longshoreman's and Warehouseman's Union v. Boyd*, 347 U.S. 222 (1954) (declaratory judgment vacated because questions of scope and constitutionality of legislation must not be decided "in advance of its immediate adverse effect in the context of a concrete case."). We should not pass unnecessarily on the constitutionality of the Corps regulation. The declaratory judgment of the District Court is therefore vacated and the claim dismissed.

APPENDIX<sup>5</sup>

**APPENDIX B**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

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Nos. 81-1405  
 81-1498

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UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC.,  
 ET AL., RESPONDENTS

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[Filed June 8, 1984]

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**ORDER DENYING PETITION FOR REHEARING  
 EN BANC**

Before: MERRITT and MARTIN, *Circuit Judges*;  
 WEICK, *Senior Circuit Judge*

No member of the Court having moved for en banc consideration of this case and the panel being of the view that reconsideration is not warranted, the government's petition, as supported by amicus curiae organizations, is hereby denied.

By an unusual construction of the words "navigable waters" in the Clean Water Act, the government and organizations filing as amicus curiae would apparently have the Court by injunction prevent the owner from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into "navigable waters" by the Court without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable

waters. Under such a construction low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is over broad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction.

**ENTERED BY ORDER OF THE COURT**

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/s/ John P. Hehman  
 JOHN P. HEHMAN  
 Clerk

**APPENDIX C**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

Civil Action No. 77-70041

**UNITED STATES OF AMERICA, PLAINTIFF,  
v.**

**RIVERSIDE BAYVIEW HOMES, INC.;  
ALLIED AGGREGATE TRANSPORTATION COMPANY,  
DEFENDANTS.**

**OPINION AND ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION IN PART**

Plaintiff seeks a preliminary injunction restraining defendants from further filling certain land in Macomb County, Michigan, owned by defendant RIVERSIDE BAYVIEW HOMES, INC. (hereinafter referred to as RIVERSIDE), unless a permit is issued for such filling operations by the United States Corps of Engineers.

The property owned by defendant RIVERSIDE consists of two adjacent parcels, one approximately 60 acres which was subdivided and platted in 1916,<sup>1</sup> [Exhibit 39], and an adjacent parcel to the north and east, of approximately 20 acres which has never been platted.<sup>2</sup> RIVERSIDE had already filled a portion of the property, some of it without objection. It is plaintiff's

<sup>1</sup> Water mains and fire hydrants were installed at that time in a portion of the property in dispute.

<sup>2</sup> Defendant ALLIED AGGREGATE TRANSPORTATION COMPANY is a contractor engaged in hauling dirt to the site. If RIVERSIDE is enjoined the injunction will extend to it as well since it claims no independent right to fill.

position that all of the unfilled property to the south and east of the present fill is a "wetland" as defined by the regulations adopted by the Corps of Engineers pursuant to authority granted under the Federal Water Pollution Control Act, Title 33, United States Code, section 1251, *et seq.* This statute grants to the Corps of Engineers, acting on powers delegated by The Secretary of the Army, authority to regulate and either permit or refuse to permit fill to be placed on certain land. Plaintiff relies specifically on subsection (h) of paragraph (d)(2)(i) of the Regulations. Paragraph (h) provides:

Freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters and that support vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.<sup>3</sup>

Numerous witnesses testified at hearings held January 13, 15, 17, 19, 20, 21, and 22; voluminous exhibits were presented to the Court. At the request of all parties, the Court viewed the area in question on Saturday, January 22, 1976.

Several of the Government's witnesses testified that vegetation now in the property is wetland vegetation; i.e., it requires saturated soil conditions. Indeed, defendants' witnesses conceded that there was wetland vegetation. The only dispute between the witnesses was as to the classification of the wetlands. Based upon all of the evidence, the Court finds that the unfilled portion of the property is now "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

The Court further finds that the property is contiguous to a navigable water, namely Black Creek, a tributary of Lake St. Clair. Defendants' property is sepa-

rated from both Black Creek and from the man-made channels of Savan Drain which connect with Black Creek by approximately 200 feet at the southeast corner, where a north-south drain which connects to the Savan Drain approaches the closest to defendants' property, and by two ten-acre parcels along the south boundary. This area which separates the legal boundaries of defendants' land from the navigable waters of Black Creek and the canals and drain is also "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In determining whether an area is contiguous, the Court must look at whether the wetland type vegetation continues to the navigable waters. Any other interpretation would permit a landowner of contiguous and adjacent wetlands to deed a ten-foot strip between the navigable water and his property to some third person and then claim that the wetlands were no longer contiguous or adjacent.

Sharply conflicting testimony was offered by plaintiff's experts and RIVERSIDE's expert as to the reason for the "prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Plaintiff's experts were of the opinion that the water in Lake St. Clair, Black Creek and the canals or channels and the overflow from the same were the principal causes of the prevalence of such vegetation. None of these witnesses, however, were soil experts and none had done any definitive tests on the soil. Only one expressed an opinion as to the type of soil (he testified it was muck), but this was based on visual inspection and not, by his own admission, on laboratory tests which would be the appropriate scientific method to use.

Mr. Thomas P. Gough, Macomb County Public Works Commissioner and formerly District Commissioner of the United States Soil Conservation Service, testified that the reason for the prevalence of wetland

type vegetation on this particular property was the type of soil found on the property and not its proximity to Lake St. Clair, Black Creek or any canals feeding into them. Based on studies done by the Department of Agriculture in 1968, Soil Survey, Macomb County, Michigan, Exhibit 28, he testified that the soil on the property in question was Lamson soil, not muck or marsh, and that type of soil would and does support "vegetation that requires saturated soil conditions for growth and reproduction" whether it is found near Lake St. Clair or several miles inland. He testified that the nearness of the lake and the canals had no hydrological effect on the soil beyond a 50 to 100-foot distance. The Court finds his testimony logical, based upon knowledge and qualifications superior to that of the plaintiff's expert witnesses, and accepts it. Thus, it finds that except for such portions of the property as have been inundated and then only for the period of inundation, the contiguous navigable waters have not contributed to the wetland type of vegetation on defendants' property.

The 20-acre parcel of defendants' property is directly south and across the River Road from the Clinton River. River road is a raised road bed. Mr. Gough testified that the water in the river was not the cause of the prevalence of existing vegetation in the 20 acres for the same reason; i.e., that it does not drain well, that Lamson soil is characterized by high water table and water near the surface, and if it is tiled, tiles must be no more than 100 feet apart since the water will not pass through such soil a distance of over 50 feet. The Court also credits this testimony and so finds.

The regulation under which the Corps of Engineers claims jurisdiction requires not only wetland vegetation but also that the area be "periodically inundated."

This is the most difficult issue to resolve in determining whether RIVERSIDE's property is subject to the

permit requirement of the statute. Is it "periodically inundated" by water from Lake St. Clair, the Black River or the canals? Inundated, of course, means flooded, and is easy of definition.<sup>3</sup> Periodic, however, is much more difficult. The instant regulations were adopted in haste following a decision by the United States District Court for the District of Columbia in *NRDC v. Callaway: et al.*, 392 F. Supp. 685 (1975), (Aubrey Robinson, J.) holding that the previously adopted regulations were insufficient to cover the statutory objective. The Corps of Engineers published in Vol. 40, No. 88, Part I, Federal Register for May 6, 1975, four alternative sets of proposed regulations. As noted there, because of the time constraint of the District Court's order, the Agency was not "able to prepare an environmental impact statement pursuant to the National Environmental Policy Act and the Guidelines of the Council on Environmental Quality." Perhaps for the same reason of haste, the regulations do not define periodic when dealing with inundation of fresh water wetlands. When defining other terms, such as "ordinary high water mark" with respect to inland fresh water, the regulations are quite specific. 209.120(d)(2)(h)(ii)(a) states that it "is established as that on the shore that is inundated 25% of the time." Where specific data is not available, it can be estimated by the characteristics of the area.

The dictionary definition of "periodic" and the noun from which it derives, "period" are helpful but not con-

<sup>3</sup> Websters New International Dictionary, Second Edition, Unabridged, defines inundate as follows:

1. to cover with a flood; to overflow; deluge; flood.
2. to fill with an overflowing abundance or superfluity; as, the country was inundated with bills or credit. Synonym = overwhelm, submerge, drown.

clusive. Websters, *supra*, defines "periodic, as applicable here as follows:

1. Of, pertaining to or performed in a period, or regular revolution of a heavenly body, as a planet's periodic time or motion.
2. Characterized by periods, occurring at regular stated times, acting, happening, or appearing at fixed intervals; loosely, recurring; intermittent; as periodic epidemics.
3. Consisting of a series of stages or processes, which is regularly repeated; as a periodic vibration.

It also defines:

**Periodic Curve—**

*Math and Physics.* A curve formed by the continued repetition of some part of itself.

**Periodic motion—**

*Physics.* A recurrent motion in which the intervals of time required to complete one cycle and begin another are equal.

**Periodic star—**

*Astron.* A variable star whose changes in brightness occur at fixed periods.

Period is defined as:

4. A portion of division of time. Specif.: a. A portion of time as limited and arranged by some recurring phenomenon, as by the completion of a revolution of a heavenly body; a division of time, as a series of years, months or days in which something is completed, and ready to recommence and go on in the same order; cycle; tidal periods; the annual period of Uranus.
17. *Physics & Elec.* The interval of time required for a periodic motion or phenomenon to complete a cycle and begin to repeat itself; as, the period of a pendulum or of an oscillatory or alternating current. The period in seconds

equals one divided by the frequency in cycles per second.

Turning then to the periods in which the land has been inundated, the evidence established the monthly mean water levels of Lake St. Clair. It was also established that the level of Lake St. Clair would control the level of Black Creek and the canals or channels in the area of the property belonging to defendants. This level has varied from a high in 1973, of 576.6 feet to less than 571 feet.

The testimony of Mr. Benjamin DeCooke was that the mean of Lake St. Clair's monthly mean water levels in 573.15 feet. He also stated that the mean high water level of the lake, a level that is one standard deviation above the mean, is 574.4 feet. The lake would be at or above its mean high water level about 16 percent of the time. He further testified that the normal distribution of Lake St. Clair water levels was such that a level of 575.0 feet would be two standard deviations above the mean; this level would be reached or surpassed about two percent of the time. See *United States Department of Commerce, Handbook of Mathematical Functions* 968 (Applied Mathematics Series No. 55; 1964).

Mr. DeCooke further testified that the water levels for a month normally varied six inches up or down from the mean. The greatest recalled high from the monthly mean was, he testified, one and one-half feet. Although there is no contour map of defendant's property, there are maps providing a number of elevations from 580.20 to 574.81 [Exhibit 59]. The mean of the elevations on the south and east of defendants' property is 574.6, ranging from 575.70 to 574.45. Using the monthly mean level of Lake St. Clair in Exhibit 52, and adding six inches, the normal variation, it is immediately apparent that there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been

true most of the time. Recent high water levels (1973-1975) have been the highest since Lake St. Clair levels were first recorded in 1897. Using the average elevation of the most southerly and easterly boundaries of BAYSIDE properties of 574.6, there have been periods in only 14 of the 80 years of recorded lake levels in which the monthly mean inundated the property,—or, 17% of the time. Some of the higher elevations have been inundated only during the last recent unprecedented high water or have never been inundated.

What case law there is on the subject of periodic inundation is not helpful in the instant case. In *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla., 1974), the Court found certain mangrove swamps periodically inundated where the United States Geological Survey tide gauge data indicated that 50-100 tides exceeded two feet in the subject water each year. This frequency and yearly occurrence clearly indicates a conclusion that it was periodic. The evidence in the instant case disclosed that portions of defendant's property had been farmed in past years [testimony of Harry Helger and Exhibits 26 and 2].

In *United States v. Golden Acres, Inc.*, E. D. N. Car., Jan. 13, 1977, No. 76-0023-Civ-4, the Court found the property (on the Intercoastal Waterway) inundated in periods of storms [Finding 6]. Although there is no express finding of how often these storms would occur, it may be presumed that they would at least occur annually.

Clearly, a single inundation would not be periodic, nor would two. Here, as to certain portions of the land, there have been three inundations in eighty years. They have been at, roughly, 20-year intervals, but not in accordance with any fixed cycle or certain duration.

The Corps of Engineers has apparently adopted an elevation of 575.7 as the level below which it claims jurisdiction [Exhibit 59]. However, no evidence was

offered as the basis for this decision. If the level of 575 is adopted it would not have been exceeded since recording the lake levels in Lake St. Clair began in 1897 until 1929, when the lake level reached 575.7 and exceeded 575 for three months. The next time 575 was exceeded was in 1951 and 1952, then, again, in 1969, and finally in the 1972-1975 unprecedented high-water period when many, many established homes and subdivisions were inundated. If the Corps of Engineers' figure of 575.7 were adopted, it would have been exceeded only in 1973-1974, the years of unprecedented high-water levels in the Great Lakes. Although the inundation lasted for several months, the Court believes the period should be considered as a unit. Considering the history of the water levels presented to the Court, this period of flooding is not "periodic". It constitutes less than 2% of the time that the lake levels have been recorded.

The Court is left in the unenviable position of having to define "periodic" without knowing the reason for the adoption of this standard. Counsel for the Government has argued that it is to conserve the wetland for habitat of wetland creatures. Yet, this regulation does nothing to prevent defendant from tiling the area so that except during the brief periods it is inundated wetland vegetation could not survive. Indeed, counsel for defendant urges that periodic inundation means inundated sufficiently often so that the inundation is the reason for the presence of wetland type vegetation. That standard has a rational basis but is not the one stated in the regulation. In the Court's opinion, something that has occurred less than five times in the last 80 years cannot be said to have occurred periodically. If treating the years 1972-1975 and 1952-1953, as one occurrence, then the lake levels have exceeded 575 feet only four times (1928, 1952-1953, 1969 and 1972-1975). If the level of 574.9 feet were to be considered, the number of occur-

rences would increase to six. From this it is clear that determining the level at which the inundation would be considered "periodic" is difficult and perhaps somewhat arbitrary. The Court must choose the point at which an occurrence became periodic. It has selected more than five. It therefore determines that the appropriate level is 575 feet, plus the half-foot of normal monthly fluctuation above the mean. The Court, therefore, hereby enjoins the fill of all land south and east of a contour line of the elevation of 575.5. If there are pockets of lower-lying lands entirely within this contour line, they may be filled. All fill is enjoined, however, until a survey has been made and filed with the Court, and the Government has had a reasonable opportunity to object to its accuracy. Defendants may, of course, apply for a permit to fill any additional land.

/S/ Cornelia G. Kennedy  
CORNELIA G. KENNEDY  
*United States District Judge*

Dated: FEBRUARY 24, 1977  
 Detroit, Michigan

**APPENDIX D**  
**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF MICHIGAN**  
**SOUTHERN DIVISION**

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Civil No. 77-70041

UNITED STATES OF AMERICA, PLAINTIFF,  
*v.*

RIVERSIDE BAYVIEW HOMES, INC., AND  
 ALLIED AGGREGATE TRANSPORTATION COMPANY,  
 DEFENDANTS.

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[Filed June 21, 1979]

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**OPINION OF THE COURT**

The evidence heard during the motion for preliminary injunction was admitted under Rule 65, F.R.Civ.P., as part of the record in the trial of this action. The court's findings of fact and conclusions of law on that motion are also incorporated herein by reference.

At the time of the hearing on the preliminary injunction Mr. Thomas Gough, Macomb County Public Works Commissioner and formerly District Commissioner of the United States Soil Conservation Service, was qualified as an expert witness and testified that in his opinion there was no hydrological connection between Lake St. Clair and the land in question owned by defendant Riverside. The only additional evidence offered by the parties at the trial related to this factual issue, i.e., is there a hydrological connection between Lake St. Clair (the Clinton River and the Black River) and the land in question.

Subsequent to the hearing on the motion for preliminary injunction and prior to the trial, the plaintiff obtained a discovery order permitting it to make borings on the property. The manner in which the holes were dug, elevations established, etc. is also contained in the deposition of Arnold J. Rybak taken December 6, 1977, which was received in evidence by stipulation of the parties (Exhibit 93). The results of these tests, and the manner in which the field investigation was performed including the location of the holes is summarized in Otto deposition exhibits 2 and 3 which were received in evidence by stipulation.

By stipulation the deposition of William C. Otto, an employee of the Corps of Engineers, was also received in evidence. Mr. Otto has a B.S. in Civil Engineering from Notre Dame University, had extensive experience as an engineer, both with the United States Navy and other employers before joining the Corps. His experience included designing installations such as airfields and dry docks where soil stability was an important factor. Since 1957 he has been Chief of Foundations and Materials for the Corps which deals with all phases of design of permanent sea-beach bearing capacity piles and has made studies of ground water control, stability of slopes, etc. He testified that the engineer's interest in soil differs from that of those interested in agricultural characteristics, since the engineer is interested in the flow of water at deeper depths and in the bearing capacity of the soil. Mr. Otto directed the location of the boring holes made in defendant's property. He also testified in greater detail about the manner in which the soil samples were taken from the boring holes and it was he who determined the type of soil taken at the various levels of the borings. He also noted the elevation at which water was first observed in a hole and recorded the height to which it rose in the respective holes and the period of time it took to do the same. Two

sets of three holes each were made. Each hole in a set was 100 feet from the nearest hole. He described the soil as loose black organic sand with fibers (p. 28, Otto deposition). He testified that the soil taken from the holes would be classified as Lamson soil.

It was Mr. Otto's opinion that there was "a definite connection between the lake (Lake St. Clair) and the holes" (Otto deposition transcript 33) in that the water in the subsurface soils was connected to the lake and the river (Clinton River). It was Mr. Otto's opinion that the soil was a mottled sand and clay, and that the sand was inter-disbursed all through the soil providing paths for the water to go up through the soil from water bearing sand below (Otto deposition transcript 37). He testified that Lake St. Clair and the Black River would act as hydraulic heads providing pressure to force water through the soil. When asked whether the water which came up in the holes could be draining toward Lake St. Clair and the Clinton River, Mr. Otto testified that it was not, because the water "came in faster the closer we got to the lake" (Otto deposition transcript 50).

Mr. Gough was recalled by defendants to supplement testimony given at the preliminary injunction hearings and to rebut Mr. Otto's testimony. Mr. Gough testified that if, as Mr. Otto claimed, the water and the holes resulted from a hydrological connection with the lake, the water in each hole should be at the same level, where, as here, the holes are 100 feet apart. He pointed out that this was not the case and indeed in one hole no water had come in. It should be noted that this hole was refilled almost immediately after it was dug. However, in some of the other holes the water was coming in as the holes were being dug. Mr. Gough explained the water in the holes represented the water table of the area and reiterated that Lamson soil simply does not drain more than 50 to 100 feet laterally. The level of

Lake St. Clair on the day on which the holes were dug, was shown to be 574.14 feet. Mr. Gough testified that if there were a hydrological connection, as Mr. Otto opined, hydraulic pressure of the lake would push the water in the holes to that level. He felt it was significant that the water was the highest in the middle hole of the most northerly three holes, while the most easterly of these three holes was closest to the lake. There was almost a four-inch difference in the water level of these two holes, too great a difference in his opinion if the water were there as a result of a hydrological connection with Lake St. Clair. He testified that he would expect the difference in the water levels to be no more than one inch if due to such hydrological relationship. The difference of about six inches in the water levels in the other set of three holes and the absence of water in the third hole in that set was further evidence, he testified, that the water was from the seasonal water table and not hydrologically connected to the lake. The holes were dug in August. It was his opinion that because Lamson soil drained so poorly, it is likely to have a high water table.

Mr. Gough pointed out the presence of homes closer to the lake than the subject property. It was his opinion that if there were a hydrological connection of all the lands in the area with Lake St. Clair, as Mr. Otto testified, that the foundations of these homes would be unstable, which is not the case. In further support of his conclusion he pointed to the effectiveness of the Savan drain (a drain to the south of the property in question) which flows through similar Lamson soil. He noted that there is an effective pumping station on this drain which lifts water 4½ to 5 feet from the west into an extension of the drain to the east where it then flows into Lake St. Clair. He pointed out that if Mr. Otto's conclusions were correct, this water would be flowing back underground because of the hydrological head of

Lake St. Clair, forcing water into the canal above the pump and that the pumping station under those circumstances would surely be recirculating the water.

Mr. Otto was recalled in rebuttal. He testified that there were differences in the permeability of the soil at each boring site. His explanation as to the difference in the water levels in the holes was that the holes were not left open for a sufficient length of time to permit the water to reach the same level and had they been left open a longer period of time the water would have stabilized. It should be noted that defendant did not prevent plaintiff from leaving the holes open for a longer period of time. The holes were filled up for safety reasons at the end of the day on which they were bored. The government had hired the boring rig for only a single day. Mr. Otto found no significance in the presence of homes near the lake. It was his opinion that soil which had such hydrological connection with the lake was suitable bearing soil for a road or homes so long as it was not subject to consolidation. On cross examination, he testified that the soil from the borings would be classified as Lamson soil. Although he conceded that type of soil could have a naturally high water table, he maintained his position that where the soil is permeable and the levels of water the same as the lake, that there is a hydrological connection.

Both Mr. Otto and Mr. Gough had exceptional qualifications and were extremely knowledgeable regarding soils. Further, each was a completely truthful witness in the court's opinion. What the court is faced with is two expert witnesses who simply do not agree in their conclusions. The burden of proof is on the plaintiff and the court finds that it has failed to preponderate on this issue. Indeed it finds the balance tilts slightly toward the defendant Riverside. The reasons given by Mr. Gough for his conclusion are slightly more persuasive than those of Mr. Otto. The difference in the heights to

which the water rose in the boring holes and the significant difference in the rapidity with which some filled with water is more consistent with Mr. Gough's opinion than Mr. Otto's. Mr. Gough seemed more knowledgeable about drainage qualities of Lamson soil and soil in this area. Exhibit 28, "Soil Survey, Macomb County Michigan", issued September, 1971 by the United States Department of Agriculture, Soil Conservation Service, in cooperation with the Michigan Agricultural Experiment Station confirms Mr. Gough's testimony when it states that in Lamson soil the depth to seasonal high water table is less than one foot.

In its opinion and order granting the motion for preliminary injunction, the court found that the waters of Clinton River, Black River and Lake St. Clair do not contribute and "have not contributed to the wetland type of vegetation on defendant's property" except for the periodic inundation. Based upon both the evidence at the preliminary injunction hearing and the additional evidence received at the trial, the court makes the same finding.

Defendants have urged the court to reconsider its previous holding that the Federal Water Pollution Control Act is constitutional. The court believes that its earlier conclusion was correct and that the Act is constitutional.

Defendant also asks the court to withdraw its earlier interpretation of the regulation regarding periodic inundation. The court believes its earlier interpretation set forth in its opinion and order of February 24, 1977 was correct and declines to modify it.

For the reasons stated the court finds that plaintiff is entitled to the injunction prayed for in its complaint.

#### COUNT THREE—DEFENDANT'S COUNTERCLAIM

The court previously denied the plaintiff's motion for summary judgment with regard to a portion of Count Three of defendant's counterclaim which asked for a de-

claratory judgment that 33 C.F.R. § 209.12(a)-(12)(ii)(b), now revised as 33 C.F.R. 326.4(e) (see 42 Federal Register 37159 (July 19, 1977)) is unconstitutional as a taking of Riverside's property without due process of law. That regulation adopted pursuant to the Water Pollution Control Act states,

"If the District Engineer refers a case to the local U.S. Attorney or if criminal and/or civil action is instituted against the responsible person for any unauthorized activity, the District Engineer shall not accept for processing any application for a Department of the Army permit until final disposition of the referral action and/or all judicial proceedings, including the payment of all prescribed penalties and fines and/or completion of all work ordered by the court."

The parties have stipulated that Riverside filed an application for a permit to fill the property in question on or about November 15, 1976. The Corps by letter advised plaintiff that it could fill to a marked contour line and later posted the property. When the fill was being dumped beyond this line, the instant action was brought and the court issued a temporary restraining order and later a preliminary injunction prohibiting fill beyond a contour line which differs somewhat from the earlier contour fixed by the Corps. Because of the reference of this matter to the United States Attorney to bring this action, there has been no further processing by the Corps of Engineers of Riverside's application and the Corps admits will be none until the action is concluded and the regulation complied with.

The Corps urges that the regulation does not effect a taking of Riverside's property within the meaning of the law since any injury Riverside may suffer would be compensable, i.e., if there is a taking it may seek compensation in the Court of Claims. Further, plaintiff notes that any hardship Riverside suffers is the result of its own wrong doing. Riverside responds that the

regulation is not rationally related to a governmental purpose, that it chills Riverside's right to enter into litigation with the Army Corps of Engineers, as well as affecting any decision to appeal an adverse judgment, and in so operating the regulation presently deprives the defendant of substantial rights.

The refusal of the plaintiff to process Riverside's application for a permit to fill, based as it is on the specific direction of a regulation, is a final agency action. See *Stanard v. Olesen*, 74 S. Ct. 768, 772 (1954) (Douglas, J., Circuit Justice). The harm continues in both the restriction on Riverside's property rights and more importantly its ability to engage in litigation.

Pursuant to U.S.C. § 706, the Court may review agency action if it finds the agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right", may set it aside. 5 U.S.C. § 706(2)(C). In the present case, Congress has not spoken directly on the question of the Corps power to suspend the processing of licenses. The Act provides very generally that the administrator is authorized to promulgate regulations to carry out his functions. 33 U.S.C. § 1361(a). However, it does not appear that this regulation has been promulgated pursuant to any grant of legislative authority. In that part of the Act authorizing legal action against violators, the procedure is spelled out in detail. Sanctions are included, but there is no mention of delaying the processing of permit applications as an appropriate sanction. See, e.g., 33 U.S.C. § 1319 (1344)(s). Where a problem lies within the purview of an agency the United States Supreme Court has generally held that Congress must have intended to give the agency authority to deal with the evil. *Pan American World Airways v. United States*, 371 U.S. 296, 312 (1963). The regulation here, however, does not address a problem peculiarly within the purview of the agency but rather addresses a problem com-

mon to all regulatory and statutory schemes, enforcement. The Administrative Procedure Act provides "a sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and as authorized by law". 5 U.S.C. § 558(b). The instant regulation has the effect of imposing a sanction not contemplated in the act. Delay of the sort involved in this case is clearly a sanction for it operates to deprive the defendant Riverside of its rights as effectively as any direct action intended to have that effect.

Moreover, Congress has expressed its intent in the Water Pollution control act that "duplication, needless paper work, and delays in the issuance of permits under this section" shall be minimized. 33 U.S.C. § 1344(g); see also 5 U.S.C. § 558(c). A requirement that the processing of permits be halted is inimical to this express purpose of the Act.

The regulation carries a threat of violating constitutional rights. It has serious possibilities of abuse. See *Stanard v. Olesen, supra*. In this case the effect of the regulation is to effect a quasi-taking of property unless and until a person relinquishes any right the person may have to engage in litigation with the Corps of Engineers. Had the regulation not existed, there could now be judicial review of final agency action in this matter. If a decision is eventually made by the Corps that the Act does not apply to the defendant Riverside's land or that a permit should be issued, unnecessary damage will have been caused by the regulation. It places the Corps in a particularly advantageous bargaining position in a dispute. Absent a clear congressional directive, a party should not be denied the right to litigate the constitutionality of a statute or regulation on peril of losing its rights to pursue its administrative adjudication remedies. The Corps has adequate means of securing compliance with the statute and regulations

by its right to apply to the United States District Court for injunctive relief as well as the sanctions expressly provided in the statute. The Corps does not need this additional sanction to compel enforcement of its orders.

For the foregoing reason the court declares that the regulation exceeds the Corps' statutory authority and is invalid, and further that it is unconstitutional in that it impedes defendant's access to the court for adjudication of its constitutional rights.

The remaining counts and allegations of the Counter-Claim were dismissed on earlier motions to dismiss or for summary judgment.

/s/ Cornelia G. Kennedy

CORNELIA G. KENNEDY

*Chief United States District Judge*

Dated: June 20, 1979

Detroit, Michigan

**APPENDIX E**  
**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF MICHIGAN**  
**SOUTHERN DIVISION**

Civil No. 77-70041

UNITED STATES OF AMERICA, PLAINTIFF,  
 v.

RIVERSIDE BAYVIEW HOMES, INC.,  
 AND ALLIED AGGREGATE TRANSPORTATION COMPANY,  
 DEFENDANTS.

[Filed May 10, 1981]

**FINDINGS AND ORDER**

I

This action having been remanded to this Court by the United States Court of Appeals for the Sixth Circuit and having come before the Court on the parties' Joint Motion for Reconsideration, the following findings are made:

1. Trial for this case occurred before the Honorable Cornelius G. Kennedy between 1977 and 1979.
2. On June 20, 1979, Judge Kennedy issued an opinion finding that the defendant's property was a water of the United States as defined by 33 C.F.R. 209.120-(d)(2)(i)(h).
3. On March 27, 1980, the United States Court of Appeals for the Sixth Circuit, remanded this action for reconsideration in light of new regulations promulgated by the United States Corps of Engineers on July 19,

1977. Those regulations, at 33 C.F.R. 323.2(c), specifically changed the definition of "waters of the United States" to include areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adopted for life in saturated soil conditions."<sup>1</sup>

After reviewing the evidence presented before Judge Kennedy, as submitted by counsel, and upon a finding that such evidence was adequate to support Judge Kennedy's conclusion that defendant's property is a "water of the United States" as defined by 33 C.F.R. 209.120(d)(2)(i)(h) (1975), this Court concludes that:

1. As redefined by 33 C.F.R. 323.2(c), the Army Corps of Engineers' definition of "waters of the United States" is broader than its predecessor.
2. The facts, as found by Judge Kennedy that defendant's property was periodically inundated; supported a prevalence of wetland vegetation; and was contiguous and adjacent to a tributary of Lake St. Clair, i.e., Black Creek, are sufficient under the new regulations to find that those portions of defendant's property which are below the elevation of 575.5 feet above sea level are waters of the United States and therefore, subject to jurisdiction under the Clean Water Act, 33 U.S.C. 1344 and the regulations promulgated thereunder.

**FURTHER, IT IS HEREBY ORDERED AND ADJUDGED** that the defendant Riverside Bayview Homes, Inc. is permanently enjoined from depositing fill or any other pollutants into the waters of Lake St. Clair, the Clinton River, or their adjacent wetlands identified above, or in any other water of the United States, unless and until a permit therefore, has been

<sup>1</sup> This Court finds that other issues before Judge Kennedy and presently before the Court of Appeals on plaintiffs cross-appeal, No. 80-1116 were not remanded to this Court by the Court of Appeals and therefore, are not before the Court.

obtained under the provisions of the Clean Water Act,  
33 U.S.C. 1251 et seq.

/S/ HORACE W. GILMORE

United States District Court Judge

Dated: This 18th day of May, 1981.  
Detroit, Michigan

#### APPENDIX F

The Clean Water Act of 1977, 33 U.S.C. 1251 et seq., provides in relevant part:

33 U.S.C. 1311(a):

#### **Illegality of pollutant discharges except in compliance with law**

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1344(a)

#### **Discharge into navigable waters at specified disposal sites**

The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. 1344(g)(1):

#### **State administration**

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its

jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

33 U.S.C. 1362(7):

The term "navigable waters" means the waters of the United States, including the territorial seas.

Regulations promulgated by the United States Army Corps of Engineers define Clean Water Act jurisdiction in relevant part as follows (33 C.F.R. 323.2(a)-(d)):

**Definitions.**

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:<sup>1</sup>

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams),

<sup>1</sup> The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial sea;

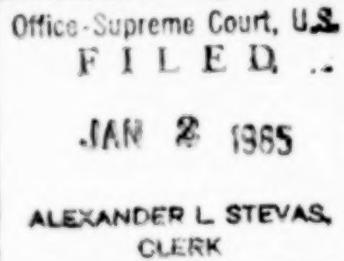
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do sup-

port, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., et al.

BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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No. 84-701

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

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BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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STATEMENT

The Court of Appeals held that the proof presented in the District Court in 1976 failed to establish that the land owned by respondent met the subsequently amended regulatory definition of a "Wetland" so as to subject the land to the regulatory jurisdiction of the United States Army Corps of Engineers (the Corps) under Section 404 of the Clean Water Act

of 1977 (CWA), 33 U.S.C. 1344. The decision below has none of the broad jurisdictional or constitutional impact alleged by Petitioner in its brief. The Court did not invalidate the Corps' regulations delineating its jurisdiction and never held the Corps exceeded its jurisdiction under either the CWA or the Constitution. The Court did not invalidate any portion of the Corps' CWA "wetlands" definition and most certainly never held the Corps could not require and process permits for the fill of those "waters" subject to its jurisdiction. Moreover, the Court did not hold subjecting property to regulation constituted a taking for which compensation was due the owner. Rather, the Court applied the Corps' own definition to the narrow issue before it and held that the proofs presented were insufficient to justify a classification

of the land in question as a CWA "wetland" as defined by the Corps. The decision was correct, entirely consistent with the decisions of other circuits and says nothing either about a taking or about the Corps' Section 404 permit process.

Whether by accident or by design, Petitioner misrepresented both the holding and the import of the decision below in its Petition. Accordingly, the focus of the first portion of this brief will be on placing the decision below in its proper context. The second portion will expand on the reasons the Petition should be denied.

1. The land in question. Though the land owned by Respondent has been described in the lower court opinions and in Petitioner's brief, the facts are so unique that they bear repeating. Riverside Bayview Homes, Inc., (Riverside) owns eighty acres of underdeveloped land

in Harrison Township, Michigan, a northeast suburb in the tri-county greater Detroit metropolitan area. The land is approximately a mile west of Lake St. Clair, south of South River Road, which roughly parallels the Clinton River, and east of Jefferson Avenue, a heavily travelled thoroughfare. Its southern boundary is separated from the man-made Savan Drain by two ten acre parcels. (2A, Appendix).<sup>1</sup> The Appendix to the Sixth Circuit's opinion, (19A, Appendix), provides a pictorial description of the property.

The land is comprised of one sixty acre parcel and a partially adjoining twenty acre parcel. The sixty acres fronting Jefferson Avenue had been

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<sup>1</sup> Pages 1A through 44A of the Appendix to Petitioner's brief contain the relevant lower court opinions. Pending the filing of a joint appendix references herein to such opinions are based on the Appendix attached to the Petition.

actively farmed along with much of the surrounding area through the early 1900's. In 1916, it was platted as a subdivision. Storm drains and fire hydrants were installed. The twenty acre parcel fronting South River Road was neither platted nor improved. (3A, 22A, Appendix). In the mid 1950's, George Short, who acquired the property to develop the platted subdivision, regularly mowed or burned off dry grass on the property. (Tr. 1-20-77, 95). The land was transferred in 1960 to the newly formed Riverside. Efforts to develop the land in the 1960's along with the surrounding area were stymied by an adjacent property owner, who blocked the rerouting of a street which dissects the property and by a local zoning ordinance which required Riverside to fill the property as a condition for securing

building permits. (3A, Appendix). In the early 1970's, Riverside began filling the property but halted when it discovered the fill being used was ill-suited to its needs. (Tr. 1-20-77, 112).

In 1973, unprecedeted high water levels on Lake St. Clair, located a mile east of the Riverside land, prompted emergency action by Harrison Township and the Corps to protect area homes and businesses from water damage. Emergency measures included building a semicircular dike which dissected the twenty acre parcel and extended southwest across the sixty acre tract. Riverside requested that any dike be built along the perimeter of its property. The Corps refused. (Tr. 1-20-77, 92). A pump was installed on the dike to keep the area to the north dry. The pumped water was discharged onto Riverside's property. A ditch along Jefferson Avenue was filled with dirt,

thereby destroying the drainage on the western border of the property. (3A, Appendix). A second and much larger pumping station was installed south of the property at the Savan Drain to lift water from the west side of Jefferson Avenue back to the east side toward Riverside's property. (35A, Appendix).

In furtherance of its development plans, Riverside contracted with Allied Aggregate Transportation Company in the fall of 1976 to haul fill excavated from an area highway project to the property. A Riverside stockholder met with Corps' personnel to discuss its plans. It was unclear whether the land would be subject to the Corps' regulatory jurisdiction. (3A, Appendix). A formal permit application was filed in November, 1976, and Riverside commenced filling the property north of the dike over which the Corps claimed no jurisdiction. A dispute

then arose as to the extent of the Corps' jurisdiction, if any. When Riverside continued to fill, the Corps asked the United States Attorney to bring this action. On January 7, 1977, then District Court Judge Kennedy, entered a Temporary Restraining Order prohibiting further filling pending a full evidentiary hearing. (3-4A, Appendix).

2. The issue before then District Court Judge Kennedy.

The complaint filed in District Court alleged Riverside discharged pollutants on a portion of its property in violation of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.<sup>2</sup> Riverside denied that its property was subject to the

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2 The FWPCA was extensively amended in 1977. One such amendment changed the popular name of the legislation to the Clean Water Act of 1977. See 33 U.S.C. 1251 Historical Note. The amended name will be used throughout this brief.

provisions of the Clean Water Act (CWA) and requested that the complaint be dismissed.

The CWA, first passed in 1948 but overhauled in 1972, was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters". 33 U.S.C. 1252(a). Congress declared as its objective "that the discharge of pollutants into the navigable waters be eliminated by 1985". 33 U.S.C. 1251(a)(1). Congress, however, recognized that the CWA created a risk of injecting an unwarranted federal presence into matters properly reserved for the States, and acknowledged the primary rights and responsibilities of the States are to make effective land use decisions. 33 U.S.C. 1251 (b).

The substantive provisions of the CWA focus on controlling water pollution, particularly industrial and sewage

pollution from point sources. Section 301, 33 U.S.C. 1342, establishes the National Pollutant Discharge Elimination System (NPDES) which authorizes the basic mechanism for applying various effluent standards to particular discharges. Sections 404, 33 U.S.C. 1344, carves out from this general authority, a specific authority for the Secretary of the Army, acting through the Army Corps of Engineers,<sup>3</sup> to issue permits for the discharge of dredged or fill material from point sources into "navigable waters".

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3 The Environmental Protection Agency (EPA) is generally responsible for administration of the CWA. However, by including dredged spoil, rock, sand and cellar dirt within the definition of pollutants, 33 U.S.C. 1362(6), the CWA created a potential overlap between the EPA's jurisdiction and the Corps' traditional jurisdiction under the Rivers and Harbors Act. 33 U.S.C. 401-413. To eliminate the need to obtain a permit from two government agencies and to maintain in the Corps its traditional jurisdiction, the authority to issue Section 404 permits was vested in the Corps. 118 Cong. Rec. 33699 (1972).

The "navigable waters" into which no pollutant could be discharged, were defined in the CWA only as the "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The CWA did not mention or define "wetlands". The Corps, however, promulgated administrative regulations in which the term "navigable waters" was defined to include: "Freshwater wetlands, including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation." 33 C.F.R. 209.120 (d)(2)(i)(h)(1976). The Corps defined a CWA "freshwater wetland" to mean "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. 209.120 (d)(2)(i)(h)(1976).

The question before then District Court Judge Kennedy was whether Riverside's property was a CWA "freshwater wetland" as defined by the Corps. On February 24, 1977, following extensive evidentiary hearings, the Court issued the first of two opinions. Judge Kennedy determined the "prevalence of vegetation" requirement was satisfied. Then she reviewed whether the property was "inundated" and whether that inundation was "periodic". Judge Kennedy candidly acknowledged that it was "the most difficult issue to resolve." (25A, Appendix).

Judge Kennedy found Riverside's land was rarely if ever inundated. Indeed, (28-29A, Appendix) she stated:

It is immediately apparent that there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been true most of the time.

This finding notwithstanding, Judge Kennedy concluded the land had been "inundated".

Her decision then addressed the question of whether the inundation was periodic. The Court found, on the basis of water levels recorded over 80 years, the land had been inundated no more than four to six times. Again, recognizing the "somewhat arbitrary" nature of her decision Judge Kennedy held that while five occurrences in 80 years was not "periodic", six occurrences in 80 years was "periodic". (30-31A, Appendix). On this basis, Riverside was enjoined from filling its land south and east of a specified elevation.

The District Court's second opinion, issued on June 21, 1979, followed trial. The District Court focused on its determination that the contiguous navigable waters do not contribute to the

vegetation on Riverside's property, except for such portions of the property as have been inundated, and then only for the period of inundation. The Court relied heavily on Riverside's expert witness, Thomas Gough, whose testimony indicated that the conditions on the land resulted from the nature of the soil and would not change whether it was found near Lake St. Clair or several miles inland. (36-37A, Appendix). Judge Kennendy, nonetheless, permanently enjoined further filling. Appeals were taken.<sup>4</sup>

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4 The District Court also held one of the Corps permit processing regulations was unconstitutional. (37-41A, Appendix). When Riverside appealed from the Courts jurisdictional decision the Corps filed a cross appeal. The Sixth Circuit held the issue raised by the Corps' appeal was moot in light of its ruling on Riverside's appeal. The Courts declined to "pass unnecessarily on the constitutionality of the Corps regulation." (18A Appendix). That issue is not discussed herein.

3. The Issue on Remand. While the case was on appeal before the Sixth Circuit, the Corps moved, and Riverside consented, to remand the case for reconsideration in light of certain regulations promulgated by the Corps in 1977, after Judge Kennedy's opinion and injunction was issued. The Corps' CWA "freshwater wetland" definition upon which the injunction and opinion was based had been modified. The Corps issued a new definition together with an extensive explanation. A CWA "wetland", 33 C.F.R. 323.2(c), was now defined as:

Those areas that are inundated or saturated by surface or ground water sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

On remand the Corps presented no new evidence, but relied on the evidence presented earlier, when the focus was on

the inundation of the land. The Corps argued that inasmuch as the amended definition deleted the word "periodic" it was broader than the previous version. (Tr. 4-30-77, 11). District Court Judge Gilmore, successor to Judge Kennedy on the District bench, agreed. He held that if the facts as found by Judge Kennedy supported her decision on a narrower definition, those same facts support the same decision based on a broader definition. The permanent injunction was continued. (42-44A Appendix). Appeals were renewed.

4. The Decision on Appeal. The issue before the Sixth Circuit was whether the relevant facts found by Judge Kennedy and applied under the 1975 CWA "wetlands" definition supported the same holding when applied under the 1977 CWA "wetlands" definition. The Appeals Court recognized

that the narrow jurisdictional issue before it turned on both the definition and interpretive guidelines issued with the amended definitions. The Court saw four such interpretive guidelines as critical. Two are mentioned here.

The preamble states the Corps' position that the "abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (July 19, 1977). The Court coupled this statement with the preamble's admonition to look at the aquatic system "as it exists and not as it may have existed over a record period of years", to form its guidelines for interpreting the Corps' definition. The Court, (10-11A Appendix), stated:

It does not necessarily follow, however, that because an area has been flooded five times in more than eighty years that, "as it exists" now, it is "inundated at a frequency and duration sufficient to

support and that under normal circumstances (does) support" wetlands vegetation. The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of such vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Were this not so, then areas which inexplicably support some species of aquatic vegetation, but which were not normally inundated, would fall within the wetlands definition. Such perverse result could not have been what the Corps contemplated in promulgating the regulation. Indeed, as noted earlier, the Corps expressly adverted to the situation of "areas that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasized that suchlands were not intended to be covered by the regulations.

Turning now to the facts as found by Judge Kennedy, and applying our interpretation of the new wetlands definition to those facts,

we conclude that the Riverside land  
is not a wetland.

The Appeals Court held the government's case factually insufficient under the amended definition and vacated the injunction. It further noted the existence of "a very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps". (15A, Appendix). However, the Appeals Court utilized a standard tenent of statutory construction and purposely avoided either an extended discussion of, or holding on, the Constitutional issue. (15A, Appendix).

Thus, the decision of the Court was confined to the jurisdictional issue based on the definitions and the Corps' interpretive guidelines. As will be shown herein, the Court's decision was correct and constitutes neither the repudiation of the CWA "Wetlands" definition nor a truncation of the Corps'

Section 404 jurisdiction as claimed by  
Petitioner.

REASONS THE PETITION SHOULD BE DENIED

1. The Sixth Circuit did not invalidate any portion of the Corps 404 program whatsoever. In fact, the Court made no reference to the Corps' jurisdictional regulations, and other than the definition of a CWA "wetland", no current regulation was cited by the Court. The Court held only that the Riverside property was not subject to the Corps' CWA jurisdiction.<sup>5</sup> Petitioner, in its brief represents that the holding was an invalidation of the

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5 It is evident from other parts of the Sixth Circuit's opinion that the Court purposely avoided a broad holding. In holding a separate issue raised by the Corps on appeal was moot the Court stated, "We should not pass unnecessarily on the constitutionality of the Corps regulations. (18A, Appendix).

administrative definition of "Waters of the United States". (Petitioner's brief, p.6). Petitioner, however, does not refer to any language from the Court's opinion to support its assertion. Indeed, there is no such language.

The assertion that the Court's singular focus on the inundation portion of the CWA "Wetland" definition invalidates that portion of the definition which includes areas saturated by surface or ground water clearly overstates the holding. The Appeals Court focused on inundation because this is an inundation case. The Corps' definition of a CWA "wetland", at the time this action was brought, did not mention saturation. It required "periodic inundation", 33 C.F.R. 209.120 (d)(2)(i)(h)(1976), and that is the requirement upon which the District Court first based its decision. On remand the Corps' argument and the District

Courts decision, continued to focus on inundation. (Tr. 4-30-81, 11). The Sixth Circuit maintained the focus on inundation, and further noted that it should have made it clear to Judge Gilmore that inundation was the subject of inquiry on remand.<sup>6</sup> (10A, Appendix). The Appeals Court analyzed the changes in the two definitions, devoted a substantial portion of its opinion to the factual determination of "periodic inundation" and quoted the relevant definition three times sans the saturation language. Thus it is

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6 Petitioner's attempt to raise the issue for the first time on appeal must fail. There was no finding by the District Court on the question of inundation and to suggest the facts allow such a finding now is pure speculation. If anything, the facts suggest the land is not saturated. The Corps clarified that saturation means water to the soil surface. 48 Fed. Reg. 21474 (May 1983). Soil borings taken at the property suggest that the water table was nearly seven feet below the soil surface on some portions of the land. (Tr. 12-6-77, 28-31).

clear that the Sixth Circuit Court's singular focus on inundation represents only that the Court realized the question of saturation was not before it. Moreover the Court never held that "saturation by surface or groundwater" is categorically insufficient for a CWA "wetland" classification.

2. Riverside contends that the approach of the Appeals Court in applying the amended definition to the facts without questioning the validity of the jurisdictional rules was correct. The Appeals Court recognized that the term "wetland", as used by the Corps, is a jurisdictional term of art. Hence, the term "wetland", does not encompass all parcels which either the general public or the scientific community may regard as a wetland. Avoyelles Sportsmen's League, Inc. v Marsh, 511 F. Supp. 278, 288 (W.D. La. 1981), rev'd on other grds, 715 F.2d

897 (5th Cir. 1983) In fact, the Corps has consistently acknowledged that its definition does not encompass all wetlands.<sup>7</sup> Thus, the Sixth Circuit's wetland determination was correct as Riverside's property is not inundated at a frequency and duration sufficient to support, and that under normal circumstances, does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. 323.2(c). The hydrological source of what vegetation there is on the property is the sub-surface nature of the soil. As the expert testimony demonstrated, neither the "four to six" inundations over the past

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7 At 45 Fed. Reg. 85341, the Corps stated, "Many wetlands are waters of the United States." Since the term "waters of the United States", 33 C.F.R. 323.2(a), includes "wetlands" a given site may be a generic wetland without being a CWA "wetland". The Corps need only have said all wetlands are "waters of the United States" if it thought otherwise.

eighty years nor the proximity of the land to Lake St. Clair had an impact on the soil conditions.

3. Riverside contends that the Sixth Circuit's reliance on the Corps interpretive guidelines was correct. Where the Corps first definition of a CWA "wetland" required a showing of "periodic inundation" the amended definition required a factual showing of "inundation at a frequency and duration sufficient to support, and that under normal circumstances [does] support" wetland vegetation. 33 C.F.R. 323.2(c) (1983). The Appeals Court looked straight to the Corps for guidance in applying the new definition and found four admonitions in the preamble to the amended definitions.<sup>8</sup> 42 Fed. Reg. 37128 (1977).

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8 Those guidelines are mentioned in the statement above and were set out by the Sixth Circuit in its opinion (8-9A, Appendix).

The Court's use of the Corps interpretive guidelines is in full accord with the well established principal that an agency's interpretation of its own regulations is entitled to deference by a reviewing Court. Ford Motor Credit Co., v. Milhollin, 444 U.S. 555, 556 (1980); Udall v. Tallman, 380 U.S. 1, 16 (1965). Riverside contends that the Corps' interpretative guidelines strongly militates against the imposition of CWA jurisdiction under the present facts relating to inundation and lack of saturated soils. Further, it is clear that CWA jurisdiction is questionable<sup>9</sup> where there is no hydrological connection to "waters of the United States" and the

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<sup>9</sup> The present facts may well present the "extravagant reach" of Corps jurisdiction questioned recently in United States v. Tilton, 705 F.2d 428 (11th Cir. 1983).

"acquatic" vegetation comprises, at best, a generic wetland. Hence, Petitioner's present position is in degradation of its own interpretive guidelines and thus, beyond the scope of laudatory deference.

When the Appeals Court turned to the facts, it noted Judge Kennedy's finding that "the source of this vegetation was the type of soil found on the property and not the few instances of flooding." (11A, Appendix). Having deferred to the Corps interpretation of its own language, the Court (11-12A, Appendix) stated:

Thus she did not find, and on the evidence presented could not have found, that the land, as it exists now, is "inundated" at a frequency and duration sufficient to support, and that under normal circumstances [does] support" the wetlands vegetation.

In conclusion, the Court's use of and reliance on the Corps interpretations of its own regulation finds ample support in the law and was not error.

4. The Sixth Circuit's approach and holding recognized and was consistent with the intent of the Congress in enacting the CWA. In making its decision the Sixth Circuit noted the express references to legislative intent contained in the enactment. The stated objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a) (emphasis added). The Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C.1251(a)(1)(Emphasis added).

The Appeals Court also noted that the "navigable waters" which Congress meant to protect are defined in the CWA itself as "the waters of the United States, including the Territorial seas." 33 U.S.C. 1362(7). It properly recognized that "Congress may, indeed, have meant to

extend the protections of the Act beyond the straightforward definition it provided of "navigable waters." (13A, Appendix).

Riverside contends it is thus incorrect to state that the Court failed to consider the legislative history. Therefore, Riverside contends that the Sixth Circuit's decision regarding the reach of CWA "wetlands" jurisdiction was consistent with the Congressional mandate. Moreover, the Fifth Circuit's decision in Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d. 897 (5th Cir. 1983) made an extended search of the legislative history unnecessary. In Avoyelles Sportsman's League, supra, the Court held that the Corps' "wetland" definition was consistent with the intent of the CWA and the Sixth Circuit so noted. (13A, Appendix).

It is important to note that wetlands preservations was not an object of

legislative intent. The 1972 version of the CWA did not even mention or define "wetlands." The CWA, in 1972, focused on controlling water pollution, particularly industrial and municipal sewage pollution and was still known as the Federal Water Pollution Control Act. Though it is clear that Congress intended that the Act reach more waters than those which met the Corps traditional definition of "navigable waters", it is by no means clear that Congress intended to include wetlands within the reach of the Act. The Senate Conference Committee explained that (118 Cong. Rec. 33699 (1972)(Emphasis added):

It is intended that the term "navigable waters" include all water bodies, such as lakes, streams and rivers regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may

be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters should have a substantial economic effect on interstate commerce.

Despite references in the legislative history to "wetlands" during Congress' <sup>10</sup> consideration of the the 1977 amendments to the CWA, the Act still does not mention wetlands except in the context of delineating the role of the states vis-a-vis the federal government. 33 U.S.C. 1344 (g)(1).<sup>11</sup> Hence, it is legitimate to conclude that vigorous "wetlands" protection pursuant to the CWA was only

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10 See, for example, 1902 Atlantic Lts., v. Hudson, 19 Envtl. Rep. Cas. (BNA 1927) (E.D. Va 1983) for one Court's review of Congressional debate.

11 On August 2, 1984, the Environmental Protection Agency approved the State of Michigan's assumption of the Section 404 program pursuant to 40 C.F.R. 233 (1980). Michigan's 404 Program, Envtl. Law Inst. (1984)

included as part of the Corps' regulatory jurisdiction subsequent to statutory enactment and thus was an afterthought.

That the CWA was not and did not become a wetlands protection act in 1977 is reflected in a comprehensive report on wetlands prepared by Congress' Office of Technology Assessment (OTA). Office of Technology Assessment, Congress of the United States, OTA-0-206, Wetlands, Their Use and Regulation (1984). The report states at 167:

There are fundamental differences in the way Federal Agencies and various special interest groups interpret the intent of Section 404 of the Clean Water Act (CWA). The United States Army Corps of Engineers views its primary function in carrying out the law as protecting the quality of water. Although wetland values are considered in project reviews, the Corps does not feel that Section 404 was designed specifically to protect wetlands.

Further, the Chief of the Corps' Regulatory Functions Branch, Bernard N. Goode, recently commented, "Section 404

was never designed to protect wetlands but rather to control the discharge of two types of pollutants into the nation's waters - dredged material and fill."

Goode, The Public Interest Review Process, National Wetlands Newsletter, Envtl. Law Inst., Jan. 1981, 6-7.

Additionally, the need to clarify the record on the intent of Section 404 was addressed by the Presidential Task Force in a recent report on reforming the 404 program. The report, Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (May 7, 1982) at 4 states:

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed

them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

Riverside contends that an analysis of pertinent indicia of legislative intent indicates that the Sixth Circuit's decision is consistent with the intent of Congress in its implementation of the CWA. By requiring the Corps to factually establish only that which its definition requires-inundation at a frequency and duration sufficient to support aquatic vegetation-the scope of Section 404 remains oriented to Congress' objectives

without becoming the federal land use regulation which Congress did not intend. To suggest under such circumstances that the Court's decision is inconsistent with Congress' intent is to suggest that the CWA was intended to be a wetlands preservation scheme.

5. The Sixth Circuit's decision is entirely consistent with decisions rendered by other circuits. The Sixth Circuit neither held nor stated that the Corps jurisdiction was limited to the traditional navigable waters. Moreover, as mentioned above, the Court explicitly recognized both that the Corps' jurisdiction extends beyond the straightforward definition of "navigable waters" Congress provided and that the Corps' CWA "wetlands" definition was held to be consistent with the intent of the Congress. The Sixth Circuit held only that the Corps must first satisfy, by

factual proof, its own jurisdictional definition. Asserting that the Court repudiated a long line of precedent without having discussed that precedent exemplifies the extent to which Petitioner has overstated the Sixth Circuit's holding.

In each case cited by Petitioner for the proposition that there is a conflict among the circuits, the Corps jurisdiction was either proven by sufficient evidence or admitted.<sup>12</sup> Further, it is difficult to draw too much guidance from other cases since the determination of jurisdiction necessarily rests on the facts of each case. For example, in United States

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12 For example, in United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979), the defendants acknowledged the Corps had jurisdiction. In Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) the Court found, as here, the Corps jurisdiction extended beyond the traditional navigable waters but expressed no opinion on the outer limits to which the Corps' CWA jurisdiction might extend.

v. Bradshaw, 541 F. Supp. 880 (D. Md. 1981)(the area subject to jurisdiction was found to be tidally influenced). See also, United States v. Weisman, 489 F. Supp. 1331 (M. D. Fla. 1980)(frequent flooding by tidal action); Hough v. Marsh, 557 F. Supp. 74, 80 n. 4 (D. Mass. 1982)(where the Court found the regulations clearly applicable); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979)(Defendant conceded jurisdiction, property inundated by lake waters); United States v. Ciampatti, 583 F. Supp. 483 (D. NJ 1984)(property subject to tidal inundation); United States v. DeFelice, 641 F.2d 1169 (9th Cir. 1981)(fill placed in a tidal canal).

There is an important distinction to be made between holding that the Corps has broad jurisdiction under the CWA, as the Sixth Circuit and many other Courts have held, and holding that the Corps has

jurisdiction in a given factual setting. The later does not necessarily follow from the former and holding, as the Sixth Circuit did, that the Corps failed to establish its jurisdiction in this particular instance constitutes neither a repudiation of the Corps jurisdiction nor a conflict among the circuits.

6. Petitioner's argument that the Sixth Circuit's Fifth Amendment, U.S. Const. Amend. V (Takings Clause), concerns were not legitimate is flawed for its promotion of a superficial analysis of the issue. A careful analysis of the Sixth Circuit's decision reveals, first, that it does not narrow the Corps' jurisdiction and, second, that the result reached by the Court was due to the facts of the case and not its discussion of Fifth Amendment concerns.

Petitioner maintains the Sixth Circuit read this Honorable Court's

decision in Kaiser Aetna v. United States, 444 U.S. 164 (1979) to require a narrow interpretation of the Corps jurisdiction. As has been repeatedly stated, the Court did not restrict the jurisdiction of the Corps in any manner except to require that it follow its own definitions. The Sixth Circuit recognized the principal significance of Kaiser Aetna, supra, to be that the navigable servitude, which necessarily permeates a discussion of Corps jurisdiction, never creates a blanket exception to the Fifth Amendment Taking Clause.<sup>13</sup> The Appeals Court did not hold that subjecting Riverside's

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13 The CWA is an enactment based on Congress' plenary powers under the Commerce Clause. It is not a police power measure pursuant to the Tenth Amendment, U.S. Const. Amend. X, as in the nature of a zoning ordinance. There has been no determination by Congress that the "paramount public interest" associated with the navigable servitude analysis extends to those properties clearly outside the scope of the navigable servitude yet allegedly within the

property to regulation would constitute a taking. Rather, the Court properly and purposely invoked a well established rule of statutory construction to avoid further inquiry into the issue. 2A Sutherland on Statutory Construction, 45.11, at 33-34 (C. Sands ed. 1973) cited by the Court provides that "the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another."

The Sixth Circuit's mention of its

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jurisdiction of the CWA. Therefore, any Fifth Amendment analysis of a CWA "wetland" taking problem should be analogous to the approach taken by this Court in interpreting the Commerce Clause in Kaiser Aetna v. United States, 444 U.S. 164 (1979), rather than the traditional Tenth Amendment analysis utilized in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) and San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) as suggested by Petitioner.

Fifth Amendment concerns was not central or even necessary to its decision on the narrow jurisdictional question before it. The Appeals Court had already decided the government's proof was factually insufficient before discussing its Fifth Amendment concerns. The brief discussion that followed its statement of its holding is therefore dicta. As this Honorable Court has stated, "[B]road language ... unnecessary to the [c]ourt's decision ... cannot be considered binding authority."

Kastigar v. United States, 406 U.S. 441, 454-55 (1982).

It is important to note that though the Sixth Circuit's discussion of the Fifth Amendment is obiter dicta, other Courts have addressed the issue and recognized the difficult problem of the appropriation of legitimate private ownership interests in the context of CWA "wetland" cases. Those cases have found

such concerns to be real and legitimate.

United States v. Tilton, 705 F.2d 428 (11th Cir. 1983); 1902 Atlantic Ltd. v. Hudson, 19 Env't. Rep. Cas. (BNA) 1927 (E.D. Va. 1983).<sup>14</sup>

7. Environmental considerations alone are insufficient to authorize the imposition of CWA jurisdiction.

Environmental considerations apply only once jurisdiction to act is established.

40 C.F.R. 230 (1983). Throughout its brief, Petitioner has interwoven discussion of the Corps jurisdictional definitions with mention of environmental considerations. Petitioner's approach does a disservice to this Honorable Court's evaluation of the Sixth Circuit's

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14 1902 Alantic, supra, also recognizes that the Tucker Act, 28 U.S.C. 1491, et seq., does not divest a reviewing Court of jurisdiction to discuss a taking issue particularly where there is no issue of monetary compensation.

decision. The Corps' regulations, like those of many governmental agencies, expressly define the scope of their jurisdictional authority. The regulations are not an end in themselves. Rather, they are a means to act and carry with them recognition of the inherent limitations on government to act. There are, then, conceivable factual situations beyond the reach of the regulations as the Corps itself has recognized. Riverside contends that this case presents such an example. The decision of the Sixth Circuit should not be viewed as placing a limit on the legitimate exercise of the Corps' authority to act once the Corps has established jurisdiction.

The factors involved in determining the Corps' jurisdiction and the factors involved in the permit process are separate and distinct. It is vital to bear this distinction in mind in

evaluating the Petition in this case.

The unauthorized mix of the jurisdictional criteria with environmental criteria permits the Corps to transform the CWA into a wetlands preservation scheme and overlooks the fact that jurisdiction forms the very basis on which the Corps is authorized to act. Riverside contends that the Sixth Circuit properly required the Corps to first establish its jurisdiction and thus insured that the Corps follow its own regulations as it has promulgated them and as the other Courts have interpreted them.

The decision below does not purport to throw a blanket prohibition on the Corps section 404 program and it does not have that effect. Accordingly, the question of the millions of acres of land which the Corps claims, without any substantiation, will be effected by the decision below is simply not before this

Court. The regulation of those acres, as with the regulation of those owned by Riverside, must be decided on the basis of their own facts under the Corps regulatory definitions.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Thomas D. McElgunn  
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January, 1985

(4)

No. 84-701

Office-Supreme Court, U.S.

FILED

JAN 10 1985

ALEXANDER L STEVENS,

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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(I)

In the Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-701

UNITED STATES OF AMERICA, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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---

**REPLY BRIEF FOR THE UNITED STATES**

---

Respondent contends that the court of appeals' decision involves nothing more than an application of the Corps of Engineers' regulations to the facts of this case and a conclusion that the government failed to prove that Riverside's property is a "wetland" subject to the Corps' jurisdiction under those regulations. Were that all that the decision below entailed, the United States would not have sought this Court's review.<sup>1</sup> Contrary to respondent's representations, however, it is clear that the court of appeals' ruling

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<sup>1</sup>We do not disagree with respondent's contention (Br. in Opp. 36-38) that the determination whether a particular parcel of land is or is not a "wetland" subject to federal regulatory jurisdiction presents a factual question the answer to which will vary from case to case. As explained in the petition, however, our concern is not so much with the particular factual determination in this case as it is with the erroneous analysis of congressional intent and principles of statutory construction employed by the court of appeals. Those errors will adversely affect future wetlands determinations within the Sixth Circuit and, because of the contrary principles employed by other circuits, result in inconsistent administration of the Section 404 program.

(1)

effectively invalidates a significant portion of the Corps' regulatory definition of "wetlands" and sets forth an erroneous interpretation of the Clean Water Act that conflicts with congressional intent and the interpretation of every other circuit to consider the issue. Accordingly, review by this Court is required to provide certainty in the administration of the nationwide Section 404 program.

1. a. As we noted in our petition (at 16 n.15), the court of appeals' interpretation of the Corps' regulation defining "wetlands" was plainly inconsistent with the regulatory language, which encompasses not only areas that are "inundated" by adjacent navigable waters but also areas that are "saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c) (emphasis added). By focusing solely on inundation, the court of appeals effectively read the language relating to ground water saturation out of the regulation. Respondent's answer is to assert (Br. in Opp. 21, 23) that "this is an inundation case" and that "the question of saturation was not before" the court of appeals. Respondent's contention is erroneous. What was before the court of appeals was the question whether respondent's property is a "wetland" for purposes of federal regulatory jurisdiction; the regulation itself makes "saturation" as much a part of that inquiry as "inundation," and the court of appeals was not free to pick and choose from among the various components of the regulation, applying some but not others.<sup>2</sup>

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<sup>2</sup>Respondent bolsters its contention that this is only an "inundation" case by arguing that the evidence at trial focused on inundation. Respondent is correct, but the reason for that focus is that the regulation in effect at the time of trial required "periodic inundation" and did not mention the alternative of ground water saturation. 33 C.F.R. 209.120(d)(2)(h) (1976); see Pet. 7-9. When the regulation was amended,

The wetlands vegetation and the saturated soil conditions that characterize respondent's property clearly bring that property within the applicable regulatory definition.<sup>3</sup>

---

the United States asked the court of appeals to remand the case to the district court to consider the effect of the amendments. On remand, there was no need for the United States to introduce additional evidence relating to saturation (see Br. in Opp. 15-16) because the record made at the first trial clearly proved that respondent's property is in fact saturated by ground water. Indeed, respondent's own expert testified that the property supports wetlands vegetation because the type of soil drains poorly, resulting in a high water table and water near the surface (Pet. App. 24a-25a). Thus, saturation was never contested and, for that reason, the United States had no occasion to brief the issue before the panel. In its petition for rehearing, however, the government squarely presented the issue of saturation (Pet. for Reh'g 7-8). The court of appeals' response was to reiterate in even stronger terms its conclusion that the Clean Water Act requires inundation caused by frequent flooding from adjacent navigable waters as a prerequisite to the exercise of federal wetlands jurisdiction (Pet. App. 20a-21a). The court's failure to mention ground water saturation necessarily constituted a rejection of the saturation component of the Corps' regulations.

<sup>3</sup>Despite the contrary testimony of its own expert, respondent asserts (Br. in Opp. 22 n.6) that its property is not "saturated" for purposes of the "wetlands" regulation. Respondent supports this contention by arguing that the Corps defines "saturated" as "water to the soil surface." Respondent neglects to point out that its citation is to a *proposed* regulation that was never promulgated. 48 Fed. Reg. 21474 (1983). In any event, the proposed regulation indicated that the presence of "water to the soil surface" on even a temporary basis could constitute saturation. *Ibid.*

Respondent also suggests that its property is not saturated because a soil boring test indicated that the water table was nearly seven feet below the surface on "some portions of the land" (Br. in Opp. 22 n.6). Respondent fails to reveal that the portion of the land to which it refers was an area that had previously been filled, and not the natural ground surface (12/6/77 Tr. 27-31). Since the very purpose of depositing the fill material was to convert the saturated property to dry upland, it is not surprising that this "portion[] of the land" revealed a low water table.

b. Despite the fact that respondent's property clearly falls within the Corps' regulatory definition of "wetlands," respondent relies (Br. in Opp. 17) on the preamble to the Corps' regulations to argue that the decision below is in fact consistent with the Corps' own interpretation of its regulations. Like the court of appeals (see Pet. App. 9a, 11a-12a & n.3), respondent misreads the preamble. The language upon which respondent and the court of appeals rely states that "[t]he abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (1977). The court of appeals observed that the presence of wetlands vegetation on respondent's property might be "'abnormal' in the sense that [the vegetation] was supported not by inundation but by unusual soil conditions" (Pet. App. 12a n.3). This is not "abnormal" in the sense intended by the preamble. Rather, the preamble makes clear that the Corps' intent was to ensure that areas that were saturated or flooded in the past but are now dry would not be treated as wetlands, despite residual wetlands vegetation. 42 Fed. Reg. 37128 (1977). This is clearly not the case with respect to respondent's property; rather, that property, as it exists now, is an aquatic area demonstrating all the characteristics of a wetland.

In sum, it is clear that respondent's contention that the court of appeals merely applied the Corps' own interpretation of its regulations to respondent's property cannot be supported. On the contrary, the court seriously misconstrued the regulations, to the detriment of congressional intent.

2. Even more significant than the court of appeals' misreading of the Corps' regulations is its holding with respect to the reach of the Clean Water Act itself. As we noted in our petition (at 11, 15), the court of appeals utterly failed to consider the legislative history of the Act, which demonstrates conclusively Congress's intention that Section 404

jurisdiction extend to the type of property at issue in this case. Respondent makes the rather remarkable rejoinder (Br. in Opp. 29) that consideration of the legislative history by the court below was unnecessary in light of the extensive consideration given to that history in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Respondent neglects to point out that the legislative history considered in *Avoyelles* led the Fifth Circuit to reach precisely the opposite result from that reached by the court below.

Respondent also attempts to defend the court of appeals' contraction of federal wetlands jurisdiction by asserting that "wetlands preservation was not an object of legislative intent" (Br. in Opp. 29-30). The legislative history of the 1977 amendments to the Clean Water Act flatly contradicts this contention; as we explained in the petition (at 13-15), debate on the 1977 amendments unequivocally demonstrates Congress's substantial concern with wetlands preservation and its ratification of the Corps' regulatory program. The court of appeals' decision frustrates Congress's deliberate decision not to restrict the scope of Section 404 jurisdiction, and it requires correction by this Court to ensure the fulfillment of Congress's purposes.

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE  
Solicitor General

JANUARY 1985

MOTION PAPER  
NOV 16 1984

No. 84-701

(2)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

*Petitioner*

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### MOTION FOR LEAVE TO FILE BRIEF AND PROPOSED BRIEF AS AMICI CURIAE

NATIONAL WILDLIFE FEDERATION, AMERICAN FISHERIES  
SOCIETY, AMERICAN LITTORAL SOCIETY,  
BASS ANGLERS SPORTSMAN SOCIETY,  
CHESAPEAKE BAY FOUNDATION, INC., ENVIRONMENTAL  
POLICY INSTITUTE, STATE OF FLORIDA, FLORIDA  
AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION,  
MICHIGAN UNITED CONSERVATION CLUBS, INC.,  
NORTH CAROLINA WILDLIFE FEDERATION,  
SCENIC HUDSON, INC., SIERRA CLUB,  
TENNESSEE CONSERVATION LEAGUE,  
WILDLIFE MANAGEMENT INSTITUTE,  
CLEAN WATER ACTION PROJECT,  
SOUTH CAROLINA WILDLIFE FEDERATION,  
ENVIRONMENTAL DEFENSE FUND, INC.,  
STATE OF MICHIGAN,  
NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
LOUISIANA WILDLIFE FEDERATION, and  
TROUT UNLIMITED

### IN SUPPORT OF PETITION

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

**No. 84-701**

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**ON PETITION FOR A WRIT OF CERTIORARI  
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AS AMICI CURIAE**

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**IN SUPPORT OF PETITION**

The National Wildlife Federation and the above named organizations (NWF et al.) hereby respectfully move for leave to file the attached brief as amici curiae in support of the United

States. The consent of counsel for the respondent has been requested but not yet obtained. The petitioner has consented.

The interest of amici curiae in this case arises from the fact that the court of appeals decision could potentially remove significant portions of this Nation's wetlands from the coverage of Section 404 of the Clean Water Act, 33 U.S.C. 1344.

Amici curiae consist of two States and various non-profit membership organizations dedicated to the conservation and wise use of natural resources including wetlands. Members and citizens of amici curiae regularly use and enjoy the wetlands of the United States for outdoor recreation, including fishing, hunting, hiking, camping, nature observation, photography, scientific study, and aesthetic enjoyment. Members and citizens of amici curiae also have a substantial interest in the protection and preservation of wetlands because these resources contribute to the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Members and citizens of amici curiae will be adversely affected by a judicial decision which removes important wetlands from the regulatory scope of Section 404 of the Clean Water Act.

Amici curiae have participated extensively in all facets of public decisionmaking on the use of wetlands. Amici curiae have also brought, entered, and filed amicus curiae briefs in numerous lawsuits involving Section 404 and wetlands. National Wildlife Federation, Michigan United Conservation Clubs, Inc., and Tennessee Conservation League filed a brief as amicus curiae in support of the United States' petition for rehearing of the court of appeals decision. A more detailed statement of the interests of amici curiae is set out as Appendix A to the attached proposed brief.

As more fully set forth in the attached proposed brief, amici curiae are concerned that the court of appeals incorrectly narrowed the geographic scope of Section 404 contrary to congressional intent. In addition, amici curiae believe that the court of appeals decision warrants review by this Court because of the decision's potential impact on wetlands which provide substantial values and therefore should be protected.

The proposed brief is intended to supplement but not duplicate the United States' petition. As such, the brief should assist the Court in determining whether to grant a writ of certiorari.

Accordingly, amici curiae NWF et al. respectfully request leave to file the attached brief in support of the United States.

Respectfully submitted,

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**PROPOSED BRIEF AS AMICI CURIAE**

---

NATIONAL WILDLIFE FEDERATION, AMERICAN FISHERIES  
SOCIETY, AMERICAN LITTORAL SOCIETY,  
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TROUT UNLIMITED

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**IN SUPPORT OF PETITION**

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**QUESTION PRESENTED**

Whether the definition of wetlands for purposes of Clean Water Act regulation correctly includes wetland areas that are not frequently flooded by adjacent streams.

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**BRIEF OF AMICI CURIAE**

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**IN SUPPORT OF PETITION**

**INTERESTS OF AMICI CURIAE**

Amici curiae consist of two States and various non-profit  
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wise use of natural resources including wetlands. Members and citizens of amici curiae regularly use and enjoy the wetlands of the United States for outdoor recreation, including fishing, hunting, hiking, camping, nature observation, photography, scientific study, and aesthetic enjoyment. Members and citizens of amici curiae also have a substantial interest in the protection and preservation of wetlands because these resources contribute to the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Members and citizens of amici curiae will be adversely affected by a judicial decision which removes important wetlands from the regulatory scope of Section 404 of the Clean Water Act.

Amici curiae have participated extensively in all facets of public decisionmaking on the use of wetlands. Amici curiae support Section 404 of the Clean Water Act, 33 U.S.C. 1344, and believe in preservation of the geographical scope of Section 404 in its present form. Amici curiae have also brought, entered, and filed amicus curiae briefs in numerous lawsuits involving Section 404 and wetlands. A more detailed statement of the interests of amici curiae is set out as Appendix A to this brief.

#### INTRODUCTORY STATEMENT

Section 404 of the Clean Water Act, 33 U.S.C. 1344, prohibits the unpermitted discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. 1344 & 1362(7). The Secretary of the Army, through his designee, the Corps of Engineers, and the Environmental Protection Agency are responsible for enforcement of Section 404. This action was brought to enjoin an unpermitted discharge of dredged or fill material into a wetlands site owned by the respondent Riverside Bayview Homes, Inc. (Riverside).

The district court held seven days of hearings and visited the site, primarily to determine whether Riverside's tract contained a wetland (Pet. App. 23a). The testimony demonstrated that the site is characterized by the presence of plants such as cattails, sedge, and common reed. E.g., Tr. Jan. 13, 1977, at

20-21, 36; Jan. 15, 1977, at 8-9, 14, 21, 87, 130. These plants require or are adapted to water-logged or highly saturated soils and, therefore, are commonly considered to be indicators of wetlands. U.S. Army Engineers Waterways Experiment Station, Preliminary Guide to the Onsite Identification and Delination of the Wetlands of the Interior United States 9-12 & A1-A10 (1982); U.S. Fish & Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979).

In addition, the evidence showed that the soil on the tract has the characteristic of retaining water and that the water table is within inches of the surface. Tr. Jan. 22, 1977, at 114-115, 163. The area has been a wetland for decades. E.g., Tr. Jan. 15, 1977, at 134. Riverside's tract is part of a larger wetland area on the western shore of Lake St. Clair (located approximately one mile from the site) and would be inundated but for a system of dikes and drains in the area. *Id.* at 156. The site is inhabited by muskrat and long-billed marsh wrens (*id.* at 54-55, 97), species found almost exclusively in wetlands habitat. Harper & Row's Complete Field Guide to North American Wildlife (Eastern Ed.) 150 & 265 (1981). At the time of the January 1977 hearing, the Riverside tract was covered by two to four inches of ice. Tr. Jan. 15, 1977, at 97.

On this evidence, the district court properly found a portion of the area to be a wetland and enjoined Riverside from filling that portion without first obtaining a Section 404 permit (Pet. App. 30a-31a).<sup>1</sup>

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<sup>1</sup> In reaching this result the court applied the definition of "freshwater wetlands" contained in regulations promulgated by the Corps in 1975. 40 Fed. Reg. 31324-31325 (July 25, 1975), formerly codified at 33 C.F.R. 209.120(d)(2)(h). Subsequent to the entry of a preliminary injunction against Riverside, the Corps' definition of wetlands was revised in 1977. 33 C.F.R. 323.2(c) (1983) promulgated at 42 Fed. Reg. 37122 (July 19, 1977). The district court entered final judgment against Riverside without reference to the revised definition (Pet. App. 32a-37a). Upon Riverside's first appeal of the final judgment, the court of appeals remanded for reconsideration in light of the new 1977 definition (*id.* at 42a). The district court (by a different judge) sustained final judgment for the United States and Riverside appealed again (*id.* at 42a-44a).

The court of appeals reversed, ruling that Section 404 was inapplicable to the Riverside tract because the site was not "frequently flooded by waters from adjacent streams" (Pet. App. 12a and 15a). The court stated that this restrictive test was necessary to prevent presumably unconstitutional takings (*id.* at 13a-16a). Accordingly, the court reversed the district court's injunction of unpermitted discharges. The United States' petition for rehearing was denied (Pet. App. 20a-21a).

### **REASONS FOR GRANTING THE PETITION**

The United States' petition should be granted because the decision of the court below frustrates the clear intent of Congress in enacting Section 404, is in direct conflict with the decision of several other circuits, and will wreak havoc on consistent nationwide administration of this important program. While these grounds are amply explained in the petition, amici curiae submit this brief to amplify several points, primarily the impact of the court of appeals decision on the resources Congress intended to protect.

It is clear that Congress recognized the importance of wetlands and intended, through Section 404, to protect these areas to the full extent of its legislative authority under the Commerce Clause. The regulatory definitions of "wetlands" fully reflect this congressional mandate and good science. However, the decision of the court below frustrates the clear intent of Congress, ignores the scientific basis for the regulatory definitions, and threatens to remove important wetlands from the scope of Section 404.

1. Wetlands indisputably perform a number of functions that are socially, economically, and environmentally desirable. Numerous species of fish and wildlife inhabit wetlands and others depend on the contributions of wetlands to ecosystem food chains. U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* 13-18 (1984) (hereafter "Wetlands of the United States"). Wetlands improve water quality by filtering nutrients, wastes, and sediments from surface runoff before these materials reach water bodies.

*Id.* at 18-19. Wetlands perform millions of dollars worth of waste treatment. *Id.* Wetlands also reduce the effects of floods and storms by providing storage space for excess water and preventing millions of dollars of flood damage. *Id.* at 21-23. In addition wetlands recharge groundwater in aquifers providing public water supplies. *Id.* at 23. Finally, and not least of all, wetlands provide significant recreation and aesthetic value to hunters, fishermen, bird watchers, and others who appreciate the natural characteristics of these areas. *Id.* at 24-25. Even this latter function is of more than sentimental value: for example, sportfishermen alone spend \$13 billion per year to catch wetland-dependent fishes. *Id.* at 24.

Approximately 450,000 acres of wetlands are intentionally destroyed every year in the United States. Wetlands of the United States, *supra*, at 31. Ninety-seven percent of this loss has occurred in inland, freshwater wetlands such as Riverside's. Office of Technology Assessment, *Wetlands: Their Use and Regulation* 7 (1984) (hereafter "OTA, Wetlands"). The State of Michigan, where this case arose, has had 71 percent of its original wetlands destroyed. Wetlands of the United States, *supra*, at 32-34.

Section 404 of the Clean Water Act is virtually the only federal regulatory statute available to protect these wetlands from destruction. *Want, Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Env. L. Rev. 4-5 (1984). Almost all coastal states have laws protecting coastal wetlands but only eight states have laws protecting inland wetlands. OTA, *Wetlands*, *supra*, at 13. Inland wetlands, which make up 95 percent of the Nation's wetlands, must rely almost entirely on Section 404 for protection. *Id.*

To a scientist, "wetlands" are essentially those areas where life can survive in a saturated environment. According to the United States Fish and Wildlife Service,

wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface. The single feature that most wetlands share is soil or substrate

that is at least periodically saturated with or covered by water. The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or in saturated soil.

U.S. Fish & Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979) (hereafter "Classification of Wetlands").<sup>2</sup> Thus the primary factor in classifying an area as a wetland is the extent and duration of water present. As a result, life existing in such areas must be tolerant of or dependent upon saturated conditions to survive. Hence, the Corps' and EPA's identical definitions of "wetlands" appropriately focus on "areas . . . inundated or saturated . . . at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c) (1983) (Corps) and 40 C.F.R. 230.3(t) (1983) (EPA).<sup>3</sup>

The source of the water for any particular wetland is irrelevant to the question of whether the area supports a prevalence of life forms typically adapted to saturated soil conditions. Thus the regulatory definitions again correctly state that the "inundat[ion] or saturat[ion]" may be caused "by surface or ground water." 33 C.F.R. 323.2(c) and 40 C.F.R. 230.3(t). By the same token the source of the water is not a limiting factor in whether wetlands perform valuable functions.

Therefore, a critical and significant flaw in the court of appeals decision is the requirement that a Section 404 wetland

<sup>2</sup> The U.S. Fish and Wildlife Service is responsible for administering the National Wetlands Inventory. See Section 208(i)(2), Clean Water Act, 33 U.S.C. 1288(i)(2). The National Wetlands Inventory is designed to use the Fish and Wildlife Service's biological expertise to provide scientific information on wetlands characteristics as well as to indicate the extent of such areas in the United States. Wetlands of the United States, *supra*, at 1. The information is intended to provide technical assistance to agencies regulating activities in wetlands. *Id.*; see 33 U.S.C. 1288(i).

<sup>3</sup> EPA shares Section 404 permit responsibility with the Corps. EPA has ultimate authority in permit decisions by virtue of its power to veto any permit issued by the Corps. Section 404(c), 33 U.S.C. 1344(c). In addition, EPA has authority to bring an enforcement action against any unpermitted discharge of dredged or fill material into wetlands. Sections 301(a), 309(b) and (c), Clean Water Act, 33 U.S.C. 1311(a), 1319(b) and (c).

must be "frequently flooded by . . . adjacent streams" (Pet. App. 15a). This standard incorrectly removes from Section 404 the numerous types of wetlands which perform valuable wetlands functions because of saturated conditions and attendant life forms.

For example, approximately three million acres of "prairie pothole" wetlands exist in the Northern Great Plains. Wetlands of the United States, *supra*, at 42. These wetlands, formed in glacial depressions in an otherwise flat landscape, are seldom frequently flooded by adjacent streams. *Id.*; M. Weller, Freshwater Marshes: Ecology and Wildlife Management 7-9 and 12 (1981) (hereafter "Weller"). Nonetheless they perform significant wetland functions. Prairie potholes constitute only one-tenth of North America's waterfowl breeding area but produce half of the annual duck crop. Wetlands of the United States, *supra*, at 42. Waterfowl hunting is a \$638 million per year business in this country. *Id.* at 24. In addition these shallow depressions provide substantial flood control functions on the Great Plains. *Id.* at 43. Potholes have been found to retain up to 75% of surface runoff. *Id.* at 22. Prairie potholes are also believed to contribute to groundwater recharge. *Id.* at 23.

Alaska's 100 million acres of tundra wetlands are the result of snowmelt and the thawing of permafrost substrate. Weller, *supra*, at 10; Office of Technology Assessment, Wetland Use and Regulation: Alaska Case Study 2-2 and 2-3 (1983). Again frequent flooding by adjacent streams plays little or no part in the maintenance of these wetlands. Yet tundra wetlands provide nesting and breeding habitat for millions of ducks, geese, other waterfowl, and shorebirds which migrate to Alaska each year. *Id.* at iii and 2-6 through 2-7. Caribou herds depend on vast areas of Alaska tundra not only for calving grounds but also for migratory range which prevents depletion of their lichen food supply. *Id.* at iii and 2-6 through 2-8.

Similarly the 2.2 million acres of pocosin wetlands in North Carolina are formed by groundwater and rainfall, not flooding by adjacent streams. C. Richardson, Pocosin Wetlands 5 (1980) (hereafter "Richardson"). These forested wetlands provide habitat for many animal species, including

coastal black bears. Wetlands of the United States, *supra*, at 49. Destruction of pocosin wetlands leads to increased freshwater runoff into saltwater and brackish estuarine systems, destroying shellfish and finfish nurseries. Richardson, *supra*, at 243-249. North Carolina's fishing industry is dependent upon estuarine nurseries and is estimated to generate more than \$300 million in revenues per year. *Id.* at 238-239.

All or most of these wetlands do not fall within the court of appeals' narrow restriction on the geographic reach of Section 404. Nonetheless they are undoubtedly wetlands from a scientific point of view and are capable of performing valuable wetlands functions. Moreover these same valuable functions stimulated Congress to include wetlands within the scope of Section 404.

2. In the course of considering proposals to restrict Section 404's geographic scope in 1977 (*see* Pet. 13-15), Congress expressly stated its concern that the Nation's valuable wetlands were being lost through ill-advised development. Many of the same wetland values discussed in Part 1, *supra*, were identified in Floor debates by opponents of an amendment to narrow Section 404's reach. Senators Stafford, Chafee, Baker, and Hart, all members of the Senate Committee reporting the 1977 amendments to the 1972 Clean Water Act, described at length these valuable wetlands roles. Congressional Research Service, 95th Cong., 1st Sess., Legislative History of the Federal Water Pollution Control Act Amendments Vol. 4 at 881-882, 917, 920-923, and 927 (1977) (hereafter "Leg. Hist."). Senator Baker's remarks summarized these values:

As you know, wetlands are a priceless, multiuse resource. They perform the following services:

First, high yield food sources for aquatic animals;

Second, spawning and nursery areas for commercial and sports fish;

Third, natural treatment of waterborne and airborne pollutants;

Fourth, recharge of ground water for water supply;

Fifth, natural protection from floods and storms; and

Sixth, essential nesting and wintering areas for waterfowl.

We should be mindful of the fact that when these areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

*4 Leg. Hist., supra*, at 923.

Although an amendment limiting Section 404's geographic scope passed the House, opponents there espoused these same values. For example, Representative Lehman argued that Section 404

is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless aesthetic and recreation benefits that are enjoyed throughout the Nation. Furthermore, wetlands provide free of charge \$140 billion worth of flood protection and water purification services, according to the clean water action project. Such priceless natural resources should be given Federal protection from development and destruction. However, the amount of wetlands in our Nation has diminished by 50 percent over the past 200 years.

*Id.* at 1317. Representative Bonior, whose District includes Riverside's wetlands, invoked similar arguments in support of broad Section 404 jurisdiction. *Id.* at 1320; see also *id.* at 1247 (House Committee Report, Additional Views of Reps. Edgar and Myers).

Recognition of the very same values discussed in Part 1, *supra*, and performed by wetlands excluded by the court of appeals decision carried the day as Congress deliberately refrained from narrowing the geographic scope of Section 404. Legislative history in this context has "persuasive value" because "Congress is not merely expressing an opinion . . . but is

acting on what it understands its own prior acts to mean.' " *Bell v. New Jersey*, 102 S. Ct. 2187, 2194-2195 & n. 12 (1983), quoting *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975). Here Congress clearly explained that in 1972 it meant the term "navigable waters" to encompass the vast multitude of wetlands so beneficial to society without regard to the kind of artificial standard invented by the court of appeals. See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (applying 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

The court of appeals' constricted reading of Section 404 would remove from the statute many of the very wetlands which Congress sought to cover. Thus the decision violates the cardinal rule of statutory construction requiring federal statutes to be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Moreover the decision casts in doubt the federally regulated status of millions of acres of valuable wetlands.

3. The court below also incorrectly ignored express congressional intent that the geographic reach of Section 404 is to be coextensive with Congress' authority under the Commerce Clause (U.S. CONST. Art. I, § 8, cl. 3). Section 404(a) prohibits unpermitted "discharge of dredged or fill material into the navigable waters . . ." 33 U.S.C. 1344(a). "Navigable waters" is defined in the Act to mean "waters of the United States, including territorial seas." Section 502(7), 33 U.S.C. 1362(7). Congress intended "navigable waters" to "be given the broadest constitutional interpretation." 1 Leg. Hist., *supra*, at 144 (Conference Committee Report on 1972 Act); see Pet. 12-13.

Other courts addressing the issue of the geographic limits of Section 404 have held that the term "navigable waters" in Section 404 was intended to reach to the limits of Congress' Commerce Clause authority. E.g., *Utah v. Marsh*, 740 F.2d 799, 802 (10th Cir. 1984); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 914-916 & n. 33 (5th Cir. 1983); *United States v. Tilton*, 705 F.2d 428, 431 (11th Cir. 1983).<sup>4</sup> Therefore

<sup>4</sup> Cf. *United States v. City of Fort Pierre*, No. 84-1162 (8th Cir. Oct. 31, 1984).

the only limits on Section 404's applicability to a wetland are (1) whether the area meets the regulatory definition of "wetlands," 33 C.F.R. 232.2(c) and 40 C.F.R. 230.3(t), and (2) whether regulation of discharges into the area is within Congress' Commerce Clause authority.

The court of appeals decision ignores the multitude of federal cases extending Section 404's coverage to the limits of the Commerce Clause. Moreover, the "frequently flooded by . . . adjacent streams" restriction is completely at odds with such an analysis since it is quite easy to identify wetlands which affect interstate commerce but do not meet the test fashioned by the court below.

For example, the Tenth Circuit Court of Appeals has recently ruled that Section 404 applies, by virtue of the Commerce Clause, to fills in an "isolated" lake (i.e., not connected to a surface tributary system) in part because the lake provides habitat for migratory waterfowl protected by other federal law and international treaty. *Utah v. Marsh*, *supra*, 740 F.2d at 804. Prairie potholes, described in Part I, *supra*, are the most significant migratory waterfowl breeding areas in North America. Most prairie potholes are not "frequently flooded by . . . adjacent streams." Accordingly the decision of the court below is wholly contrary to Congress' intent to apply Section 404 to all wetlands, subject only to Commerce Clause limitations.

b. The Sixth Circuit's unsupportable repudiation of the other circuits' rulings will lead to an unmanageable inconsistency in the enforcement of Section 404 on a nationwide basis. In addition to the practical difficulties identified by the United States (Pet. 21-22 & n. 20), the court of appeals decision creates a wholly unpredictable jurisdictional test because nowhere did the court explain how "frequently" an area must be flooded by an adjacent stream to constitute a wetland.

All that can be said is that an area flooded five or six times within the 80 years in which flooding records are available (see Pet. App. 28a-29a) is not a wetland. There is no way of knowing whether flooding five or six times within 79 or fewer years or *seven* or more times within 80 years is sufficiently

"frequent." Identification of plant species adapted to saturated soil conditions is relatively easy; identification of areas "frequently flooded" is not. Substitution of such an unworkable test for a reasonably predictable one, upheld by other courts and consistent with congressional intent, creates an intolerable and unjustified burden for regulators, dischargers, and those who wish to preserve wetlands.<sup>5</sup>

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<sup>5</sup> The United States notes that the court of appeals decision will impose substantial financial cost on regulators and landowners attempting to determine jurisdiction under the "frequently flooded" test. Pet. 21. This argument is compelling in view of the fact that Congress rejected the "traditional" navigable waters approach (see Pet. 3-4) for Section 404 in part to avoid imposing such a financial burden:

For example, the old jurisdictional mean high water line in our coastal waters was costly to establish . . . .

Today this problem has been eliminated. The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas . . . . *No longer is it necessary to expend thousands of dollars for tide experts and surveyors to establish the exact mean high water mark as required by the old [C]orps program.*

4 Leg. Hist., *supra*, at 922 (Remarks of Sen. Baker, Aug. 4, 1977) [emphasis added]. These concerns apply as well to hydrologists' costs.

## CONCLUSION

For these reasons and those stated in the petition, the United States' petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1984

## APPENDIX A

### Detailed Statement of Interests

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation maintains its headquarters at 1412 Sixteenth Street, N.W., Washington, DC 20036 (telephone 202-797-6827). The Federation is the largest nongovernmental conservation education organization in the world, with affiliate organizations in 49 states and three territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of our natural resources. The Federation undertakes a comprehensive conservation education program, distributes numerous periodicals and educational materials, lobbies for the adoption of laws to protect and improve the environment, and litigates when necessary to conserve natural resources and wildlife. The Federation has undertaken a wide range of legal, legislative, administrative, and educational initiatives aimed at improving the conservation of wetlands and other wildlife habitat.

The American Fisheries Society is a nonprofit professional society organized in 1870 to promote the conservation, development and wise utilization of recreational and commercial fisheries. The Society supports the conservation of wetlands because such areas play a critical role in the well-being of many fisheries. The Society has 8,300 members.

The American Littoral Society is a nonprofit membership organization founded in 1961 to encourage scientific research of and foster public interest in aquatic life. The Society's members include fishermen, hunters, and others who use wetlands and work for the conservation of this resource. The Society has 5,000 members.

The Bass Anglers Sportsman Society (BASS) is a non-profit membership organization founded in 1968 to fight pollution and provide conservation education. BASS's member sportsmen and 1500 affiliated local chapters are located in all

50 states. BASS's members are committed to the preservation of wetlands and water quality in order to maintain and enhance the nation's fishery resources.

The Chesapeake Bay Foundation, Inc., is a nonprofit regional membership organization founded in 1966 to promote the environmental welfare and proper management of Chesapeake Bay, including its tidal tributaries. The Foundation accomplishes these goals through citizen representation, environmental education, and land preservation. The Foundation has 6,500 members.

The Environmental Policy Institute is a nonprofit organization that conducts research, education, lobbying, and litigation on key energy and environmental laws. The Institute is dedicated to organizing economically, politically, and geographically diverse citizen coalitions on environmental issues including water quality and wetlands protection. The Institute produces a periodic educational newsletter reporting on these issues to concerned citizens across the country.

The State of Florida has a vital interest in protecting the significant wetland resources found in Florida. Over 40 percent of Florida's original wetlands have been destroyed by human activity. This loss has had a devastating effect on Florida's economy, causing increased flooding of property and decreased catches in fisheries dependent upon wetlands. Although Florida has enacted wetlands legislation, a strong federal regulatory program is necessary to enhance State wetlands protection.

The Florida Audubon Society is a statewide nonprofit organization founded in 1900 to provide an understanding of, and an interest in wildlife, and in the environment that supports it, and to further the cause of wildlife conservation.

The Florida Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Michigan United Conservation Clubs, Inc., is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The North Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Scenic Hudson, Inc. is a nonprofit citizen's conservation group founded in 1963 to improve and preserve the natural, recreational, historic and scenic resources of the Hudson River Valley, including wetlands.

The Sierra Club is a nonprofit national membership organization founded in 1892 to promote the responsible use of the earth's ecosystems, to enjoy and protect the earth's resources, and to educate humanity in the need to protect and restore the quality of the natural and human environment. With approximately 336,000 members and 54 local chapters coast to coast, the Sierra Club works on legislation, litigation, public information, and outings to protect, understand, and enjoy the natural environment.

The Tennessee Conservation League is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Wildlife Management Institute is a national nonprofit membership organization, supported by industries, groups, and individuals, promoting better use of natural resources for the welfare of the Nation. The Institute is particularly concerned with the conservation of wetlands because of the importance of this resource to wildlife habitat.

The Clean Water Action Project is a national citizen action organization founded in 1971 to work for strong pollution controls and safe drinking water. The Project believes that the conservation of wetlands contributes to both of those goals.

The South Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Environmental Defense Fund, Inc., is a nationwide public interest organization of lawyers, scientists, and economists dedicated to protecting and improving environmental quality and public health. The Fund pursues responsible reform of public policy in a number of environmental fields including water resources, land use, wildlife, and wetlands conservation, working through research, public education, and judicial, administrative, and legislative action. The Fund has 50,000 members including residents in all 50 states.

The State of Michigan was the first state in the nation to assume responsibility for dredge and fill projects, in waters regulated under Section 404 of the Clean Water Act, 33 U.S.C. 1344, from the United States Environmental Protection Agency. Michigan has a long history of concern for, and actions to protect, its valued wetlands. Michigan is vitally interested in the outcome because the controversy involves natural resources located within the State of Michigan and because, for the reasons stated in the brief of the United States, Michigan believes that this case involves issues appropriate for review by the Supreme Court of the United States.

The Natural Resources Defense Council, Inc., is a non-profit membership organization, founded in 1970, to protect America's endangered natural resources and to improve the quality of the human environment. The Council combines an interdisciplinary legal and scientific approach in monitoring government agencies, bringing legal action and disseminating citizen information on a number of issues including water pollution, resource management, wildlife protection, and coastal zone management. The Council has 45,000 members.

The Louisiana Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Trout Unlimited is a nonprofit international conservation organization founded in 1959 and dedicated to the protection of clean water and the enhancement of trout and salmon fishery resources. Trout Unlimited has 32,000 members.

(5)

No. 84-701

Office - Supreme Court, U.S.  
**FILED**  
APR 15 1985  
ALEXANDER L. STEVENS,  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 1, 1984  
CERTIORARI GRANTED FEBRUARY 19, 1985

1882-1 folder

In the Supreme Court of the United States  
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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
S.D. AT DETROIT

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No. 77-70041

REAL PROPERTY—  
All Other Real Property  
28 USC 1345  
33 USC 1311, 1319 & 1344

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**RELEVANT DOCKET ENTRIES**

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DATE NR.	PROCEEDINGS
1977	
Jan 6	1 Complaint filed, no summons issued. DD 1-6-77
" 6	2 Govt's Motion for Prel. Injunction w/ brief and affidavits. DD 1/7/77
" 6	3 Govt's Motion for Temp. Restraining Order w/ brief. DD 1/7/77
" 6	— Hrg. on Motion for TRO, granted. Hrg. and to Jan. 17, 1977 @ 10.00am. Kennedy J.
" 7	4 Temporary Restraining Order w/ notice and OSC Why a Prel. Inj. Should not Issue set for Jan. 11, 1977 @ 4:00pm. DD 1/7/77 Kennedy J.

\* \* \* \*

(1)

DATE NR.	PROCEEDINGS
1977	
Jan 12 6	Motion and OSC Why Deft's Should not be held in contempt of court w/ attachment and affidavit set for Jan. 13, 1977 @ 3:30pm. DD 1/13/77 Kennedy J.
	* * * *
" 13 8	ANSWER of both defts. to Complaint for Injunctive relief and for Imposition of a Civil Penalty. DD 1/13/77
" 13 9	Deft's Memo. of Law w/ exhibits. DD 1/13/77
" 13 —	Hrg. cont. to Saturday, Jan. 15, 1977 @ 9:00am. Kennedy J.
	* * * *
" 15 —	Hrg. on M/Prel. Inj. cont. Adj. to Jan. 17, 1977. Kennedy J.
" 17 —	Hrg. on Motion for Prel. Inj. cont. Adj. to Jan. 19, 1977 @ 9:00am. Kennedy J.
" 19 —	Hrg. on Motion for prel. inj. conts. Adj. to Jan. 20, 1977 @ 9:30am. Kennedy J.
" 21 —	Hrg. on motion for prel. inj. continues; adj. to Jan. 22, 1977 @ 8:30am. Kennedy J.
" 21 —	Hrg. on motion for prel. inj. conts. Adj. to Sat., Jan. 22, 1977 @ 10:00am. Kennedy J.
	* * * *
" 22 —	Hrg. on Motion for prel. inj. conts. Thomas Gough, sworn. Kennedy J.
" 24 —	Hrg. on motion for prel. inj. conts. Closing arguments; rebuttal; Judge Kennedy to issue opinion. Kennedy J.
" 26 12	Transcript of Jan. 13, 1977. DD 1/26/77
" 26 13	Transcript of Jan. 15, 1977. DD 1/26/77

DATE NR.	PROCEEDINGS
1977	
Jan 26 14	Affidavit of William N. Hedeman, Jr. DD 1/26/77
Feb 7 15	TRANSCRIPT of Jan. 24/77. DD 2/7/77
" 11 16	Transcript of Jan. 24, 1977. DD 2/14/77
" 24 17	Opinion and Order Granting Motion for Preliminary Injunction in Part. DD 2/25/77
	* * * *
June 9 20	Pltf's Rule 34(a) Request to Enter upon Real Property for Discovery Purposes. DD 6/10/77
" 21 21	Obj. to Request to Enter Upon Real Property for Discovery. DD 6/21/77
	* * * *
July 21 30	Order Denying Deft's Obj. to Pltf's Request to Enter Upon Real Property for Discovery. DD 7/22/77
	* * * *
1978	
Jan 5 34	Deposition of William C. Otto and Arnold J. Rybak, taken on Dec. 6/77. DD 1/5/78.
	* * * *
Mar 16 37	Transcript of January 17/77. (Volume I). DD 3/16/78.
" " 38	Transcript of January 19/77. (Volume II). DD 3/16/78.
" " 39	Transcript of January 20/77. (Volume III). DD 3/16/78.
" " 40	Transcript of January 21/77. (Volume IV). DD 3/16/78.

DATE NR.	PROCEEDINGS
<b>1978</b>	
June 20 41	Deft's Motion for Summary Judgment w/ brief, attachment, proof of service and notice of hrg. set for June 29, 1978 @ 2:00pm. DD 6/22/78
	* * * *
July 20 43	Pltf's Cross Motion for Summary Judgment w/ brief. DD 7/20/78
" 20 44	Pltf's Opp. to Deft's Motion for Summary Judgment. DD 7/20/78
	* * * *
Sept 6 46	Answer to Cross Motion for summary judgment w/proof of service. DD 9/9/78
Sept 13 —	Hearing held on cross motions for summary judgment and taken under advisement. DD 9/14/78. Kennedy, J.
Sept 22 47	Supp. brief in support of Deft's Motion for Summary Judgment. DD 9/25/78
" 26 48	OPINION and ORDER Denying Cross Motions for Summary Judgment. DD 9/27/28 Kennedy, J.
	* * * *
Oct 25 50	Counter-claim of counter ptf. Riverside Bayview Homes, Inc. with affirmative defenses. DD 10/30/78.
	* * * *
Dec 28 52	Pltf's Motion to Dismiss Counterclaim w/brief. DD 12/29/78
	* * * *
<b>1979</b>	
Jan 11 55	DEFT. Riverside Bayview Homes answer to motion to dismiss counterclaim. DD 1/15/79
	* * * *

DATE NR.	PROCEEDINGS
<b>1979</b>	
Jan 19 —	Motion to Dismiss Counterclaim heard and Granted as to Cts. 1 & 2; Granted in part and Denied in part as to Ct. 3. DD 1-23-79
	* * * *
" 22 58	Judgment of Dismissal in part, as to Defts' Counterclaim. DD 1-25-79 Kennedy, J.
	* * * *
" 29 60	Notice of filing deposition transcripts and exhibits with certificate of service. DD 1/30/79
Feb 9 61	Pltf's Proposed Findings as to Deft's Violations. DD 2-12-79
Feb 12 —	Bench Trial begins and cont'd to 2-15-79. Kennedy, J. DD 2-15-79
" 15 —	Bench Trial cont'd; Final Arguments had and cont'd to 2-19-79. Kennedy, J. DD 2-16-79
" 15 62	Pltf's Supplemental Point of Authority with certificate of service. DD 2-16-79
	* * * *
" 20 —	Bench Trial cont'd; Trial Concluded; Judge to make Findings of Fact and Conclusions of Law. Kennedy, J. DD 2-22-79
June 20 64	Opinion ordering the deft's to remove the fill to the East of the line drawn on the court's order within sixty (60) days thereof, or in lieu thereof pay a fine in the amount of Ten Thousand Dollars (\$10,000.00) each, to the Treasury of the USA. DD 6/22/79 Kennedy, J.
" 20 65	Judgment of contempt. DD 6/22/79 Kennedy, J.
" 20 66	Judgment permanently enjoining deft's. DD 6/22/79 Kennedy, J.

DATE NR.	PROCEEDINGS
<b>1979</b>	
June 20 67	Declaratory judgment and further ordering the US Army Corps of Engineers consider and enter a decision upon the application for a permit of deft. Riverside Bayview Homes, submitted 9/15/76. DD 6/22/79 Kennedy, J.
" 20 68	Opinion and order holding deft's in contempt of court for violation of temporary restraining order. DD 6/22/79 Kennedy, J.
	* * * *
Jul 20 70	Deft's notice of appeal. DD 8/3/79
	* * * *
Aug 14 73	Govt's notice of cross-appeal. DD 8/17/79
" 15 74	Govt's amended notice of cross-appeal. DD 8/17/79
	* * * *
" 24 76	Copy of Letter to Alton Cobb re: transcript needed for all proceeding before Judge Kennedy. DD 8/27/79
Sep 20 77	Transcript of 1/13/77, DD 9/21/79
" 20 78	Transcript of 1/15/77. DD 9/21/79
Nov 6 79	Transcript of 9/13/78. DD 11/20/79
" 21 80	Record transmitted to CCA. DD 11/29/79
<b>1980</b>	
Feb 7 81	Ackn~wledgement of file received at CCA; 80-1007. dd 2-07-80
Apr 17 82	Mandate from CCA that case be remanded for further proceedings in the district court. dd 4-17-80 (file returned)
Jul 7 83	Order of reassignment from J. Kennedy to J. Gilmore. DD 7/30/80. Feikens, J.

DATE NR.	PROCEEDINGS
<b>1980</b>	
Nov 21 84	DEft., Riverside, brief in response to remand in light of new regulation w/proof of service. dd 12/2/80
	* * * *
Nov 25 86	Pltf's., and deft's., joint motion for reconsideration on remand w/brief, attachments and proof of service. dd 12/2/80
Nov 26 87	Motion & order for pltfs., appearance is granted. dd 12/2/80 Gilmore
	* * * *
Dec 15 —	Deft's., exhibit #1. dd 12/17/80
Dec 19 90	Pltf., reply to deft's., brief in response to remand in light of new regulation w/certificate of service and attachments. dd 12/24/80
Dec 22 91	Deft's., reply brief in response to the court of appeals remand in light of new regulations w/attachments. dd 12/24/80
	* * * *
<b>1981</b>	
Jan 21 93	Pltf's., supplemental brief in response to defts., reply w/proof of service and attachments. dd 1/27/81
	* * * *
Feb 19 95	Pltf's., response to dfts., supplemental brief, w/proof of service. dd 2/20/81
Apr 9 96	Affidavit of George F. Short w/attachments. dd 4/13/81
	* * * *
Apr 29 99	Supplemental affidavit of George F. Short, w/attachments. dd 5/5/81
Apr 30 —	Heard motion for preliminary injunction granted. dd 5/6/81 Gilmore, J.
	* * * *

DATE NR.	PROCEEDINGS
1981	
May 18 101	Findings & order re: dfts., Riverside, is permanently enjoined from depositing fill or any other pollutants into the waters of Lake St. Clair, the Clinton River, or their adjacent wetlands or in any other water of the U.S. unless & until a permit therefore, has been obtained under the provisions of the Clean Water Act, 33 U.S.C. 1251. w/proof of service. dd 5/18/81 Gilmore, J * * * *
May 29 103	DFts., Riverside Bayview Homes, Inc., appeal on #101. dd 6/2/81 (no fee paid) * * * *
June 2 —	Notice sent to CCA. dd 6/2/81
June 2 —	Appeal fee paid. #29401 \$65.00. dd 6/3/81 * * * *
Jun 23 —	Copy of docket sheet sent to CCA. dd 6/23/81 out of date order
Jun 16 109	Letter to court re: attachment of docket sheet with entries checked off to be sent to cca for appeal. dd 6/30/81
Jul 16 110	Pltf, U.S.A., notice of appeal, Hayward Draper, AUSA, said they were appealing most of the orders in the case, w/certificate of service. dd 7/23/81 * * * *
Jul 29 113	Ack. from CCA re: notice of appeal from dft. Riverside Bayview Homes. CCA #81-1405. (the file) dd 7/30/81
Aug 18 114	FILE SENT TO CCA. dd 8/18/81
Oct 25 115	FILE SENT BACK TO CCA, (was sent here around 9/23/82 for atty. to view) dd 10/25/82

DATE NR.	PROCEEDINGS
1981	
Oct 29 116	RETURN receipt from CCA: the file. dd 11/1/82
Nov 5 117	TRAN. from 4/30/81. dd 11/9/82
Nov 9 118	SUPPLEMENTAL sent to CCA: Trans. #117. dd 11/9/82 * * * *
Nov 28 120	ACK. from CCA: return of file after atty. viewed it here in Det. dd 12/1/82
Nov 28 121	ACK. from CCA: trans. #118. dd 12/1/82
1983	
Jul 12 122	LETTER to court from Louis D. Cataldo re: communique & accompanying survey.
Aug 2 123	LETTER re: attached communique and ac- companying survey.
Oct 7 —	TRANSCRIPTS and exhibits that were left in file mailed to CCA: Attention Judy King per her request. ep.
1984	
Mar 12 124	SLIP opinion from CCA that the declaratory judgment of the District Court is vacated and claim is dismissed. pad
Jun 21 125	MANDATE from CCA that the declaratory judgment of district court is vacated and claim is dismissed w/slip opinion attached. lsb FILE RETURNED
" 21 126	ORDER denying petition for rehearing en banc from CCA. lsb

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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Nos. 80-1007 and 80-1116

UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE, CROSS-APPELLANT

vs.

RIVERSIDE BAYVIEW HOMES, INC.;  
ALLIED AGGREGATE TRANSPORTATION COMPANY,  
DEFENDANTS-APPELLANTS, CROSS APPELLEE

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RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1979	
8/17	Copy of notice of appeal swh
11/23	Certified Record (1 vol. pleadings, 10 vol. transcript, 2 vol. depositions) received from district court swh
* * * *	
1980	
01/15	<i>Certified Record</i> (1 vol. pleadings, 10 vol. transcript 2 vol. depositions), filed; and cause docketed swh
1/15	Brief (25) of appellant yh
1/15	Appendix (10) yh
* * * *	
2/4	Motion of appellee for remand to the district court for reconsideration in light of new regulations— unopposed (m-2/1) sa

DATE	FILINGS—PROCEEDINGS
1980	
2/20	Notice of Cross Appeal, filed; and cause docketed (in Certified Record) swh
2/28	Order remanding the cause for further proceedings in the district court (Lively, Phillips, and Peck, JJ.) bb
3/27	Mandate issued (No costs taxed) bb

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Nos. 81-1405 and 81-1498

UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE, CROSS-APPELLANT

vs.

RIVERSIDE BAYVIEW HOMES, INC., and  
ALLIED AGGREGATE TRANSPORTATION COMPANY,  
DEFENDANTS-APPELLANTS, CROSS APPELLEES

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1981	
6/25	1) Copy of notice of appeal filed; and cause docketed rk
7/08	<i>Certified Record</i> (2 vol. pleadings, 8 vol. transcript, 1 vol. depositions) filed rk * * * *
8/07	4) Copy of notice of cross appeal filed; and cause docketed rk * * * *
8/26	<i>Certified Supplemental Record</i> (2 vol. pleadings) filed rk * * * *

DATE	FILINGS—PROCEEDINGS
1981	
10/21	13) Order granting appellant-cross-appellee's motion to hold the briefing schedule in abeyance until 12/15/81. The appellant-cross-appellee is directed to file status reports at thirty (30) day intervals beginning 11/30/81 and further directing that the appellant-cross-appellee to file a final status report or a brief & joint appendix on or before 12/15/81 ac * * * *
12/16	15) Motion: appellant/cross-appellee to hold briefing schedule in abeyance for 90 days to and including 3/15/82 (m-12/15/81) (Motion granted; status reports to continue at 30 day intervals) tb * * * *
1982	
3/16	18) Status report and motion of appellant/cross-appellee requesting a) leave to file supplemental status report on or before 3/29/82 and b) that briefing schedule be held in abeyance to and including 3/29/82 (m-3/15/82) (Granted, JPH/ew 4/5/82) tb * * * *
7/14	23) Order granting stipulated briefing schedule; appellant c. as-appellee brief due 8/26/82; remaining briefs and joint appendix due pursuant to Rule 10 and 11, FRAP; entered pursuant to Rule 4(f) Sixth Circuit Rules. * * * *
10/27	<i>Certified Supplemental Record</i> (2 vol. depositions) filed * * * *
10/29	Brief (11) of appellants/cross-appellees (m-10/27/82)

DATE	FILINGS—PROCEEDINGS
1982	
11/12	Certified Supplemental Record (1 vol. transcript) (4/30/81)
	* * * *
12/10	Brief (10) of appellee/cross-appellant (m-12/9/82)
	* * * *
1983	
2/18	Reply brief (11) of appellant/cross-appellees (m-2/16/83)
	* * * *
3/18	Reply brief (10) of appellee/cross-appellant (m-3/18/83)
	* * * *
3/29	Joint Appendix (5) (m-3/23/83)
	* * * *
7/14	38) Letter from Louis D. Cataldo to U.S. Army Corps of Engineers with accompanying survey [PAPERS FOR THE COURT] tb
	* * * *
*10/5	Cause argued by Richard Gienapp for appellant; by Ellen Durkee for appellee and case submitted to the Court (Before: Merritt, Martin, and Weick, JJ.) lb
	* * * *
1984	

- 3/7 42) Declaratory judgment of District Court vacated and claim dismissed (Merritt, Martin and Weick, JJ.) (APPELLANTS/CROSS-APPELLEES TO RECOVER COSTS) FP tb
- 3/7 Opinion by Merritt, J. tb
- 3/19 43) Motion: plaintiff for extension to 4/20/84 to file petition for rehearing or a petition for rehearing with suggestion for en banc (m-

DATE	FILINGS—PROCEEDINGS
1984	
	3/16/84) (Motion Granted, Merritt, J. 3/29/84) lb
	* * * *
4/20	45) Petition for rehearing and suggestion for rehearing en banc (25) of plaintiff (m-4/19/84) lb
4/20	46) Motion: National Wildlife Federation for leave to file brief as amicus curiae in support of petition for rehearing (m-4/19/84) lb
4/20	Brief (15) of amicus curiae (m-4/19/84) TENDERED (Granted 4/26/84, Merritt) Filed 4/26/84 lb
4/30	47) Corporate Disclosure of amicus curiae pje
6/08	48) Order denying petition for rehearing en banc (Merritt, Martin and Weick, JJ.) jk
6/18	49) Mandate issued (COSTS NONE) tb
11/7	50) Notice of filing petition for certiorari (S.C. #84-701, filed 11/1/84) tb

## PLAINTIFF'S EXHIBIT 54

Vol. VIII *Michigan Academician* (1975)*Are Great Lakes' wetlands going under?*MODIFICATION OF COASTAL WETLANDS IN  
SOUTHEASTERN MICHIGAN AND  
MANAGEMENT ALTERNATIVESEUGENE JAWORSKI AND C. NICHOLAS RAPHAEL  
*Eastern Michigan University*

## Introduction

With the recent promulgation of state and federal coastal-zone-management legislation, shorelines and coastal environments are receiving considerable attention. In Michigan, because of record high lake levels during the past few years, attention has been focused on shoreline recession along Lake Michigan and on flooding problems accompanying onshore winds along western Lake Erie and Lake St. Clair. Another equally significant problem, though perhaps less urgent than erosion or flooding, is the modification and, in some instances, destruction of coastal wetlands. Coastal wetlands, which include bays, marshlands, and nearshore areas, have intrinsic value as biological systems, filtering basins, and habitat for fish and wildlife. Compared to the states of Minnesota and Wisconsin, Michigan is just beginning to address the problem of wetland modification and protection (1).

Two extensive areas of coastal wetlands in the state of Michigan exist along the west shorelines of both Lake St. Clair and Lake Erie, the latter stretching from Toledo northward to Detroit. Both areas are characterized by marshlands that have undergone significant modification over the past century. To demonstrate this modifica-

tion, a series of maps were constructed that depict the historical changes in the wetlands. These maps show the loss of marsh environments and also illustrate the processes by which the wetlands were modified. Data were collected through the analysis of aerial photographs and Lake Survey Charts, as well as from field studies. This investigation represents an overview of these wetland modifications and, as such, may serve as input to future wetland management and marsh protection measures.

## Lake St. Clair Wetlands

Lake St. Clair is a relatively small, shallow lake with a maximum depth of 22 feet, excluding an artificially maintained ship channel. Though the mean elevation of the lake is approximately 574 feet above sea level, record high levels of 576.5 feet have been recorded during the past few years. The principal use of the lake and lake shorelines is recreational, including boating, fishing, and seasonal waterfowl hunting. In addition, Lake St. Clair is a significant commercial waterway linking the Upper and Lower Great Lakes with a 27-foot seaway channel.

Rather detailed navigation maps of 1873 show that the wetlands of Lake St. Clair are associated with the deltaic plains of the St. Clair and Clinton Rivers (Figure 1). A coastal marsh, averaging less than a mile in width, exists within a narrow coastal zone between the two deltas. At this time, the wetlands comprise approximately 18,000 acres. Within the wetlands there were about 8,300 acres of non-marsh that consisted mainly of agricultural fields, some of which were drained marshlands. Thus, the dominant land cover at this time was primarily natural marshlands with limited agricultural or other uses.

An analysis of the coastal land use in 1973 during record high lake levels reveals that the only significant area of intact wetlands is within the interdistributary basins of the St. Clair River delta and a small portion south of the Clinton River (Figure 2). At this time the

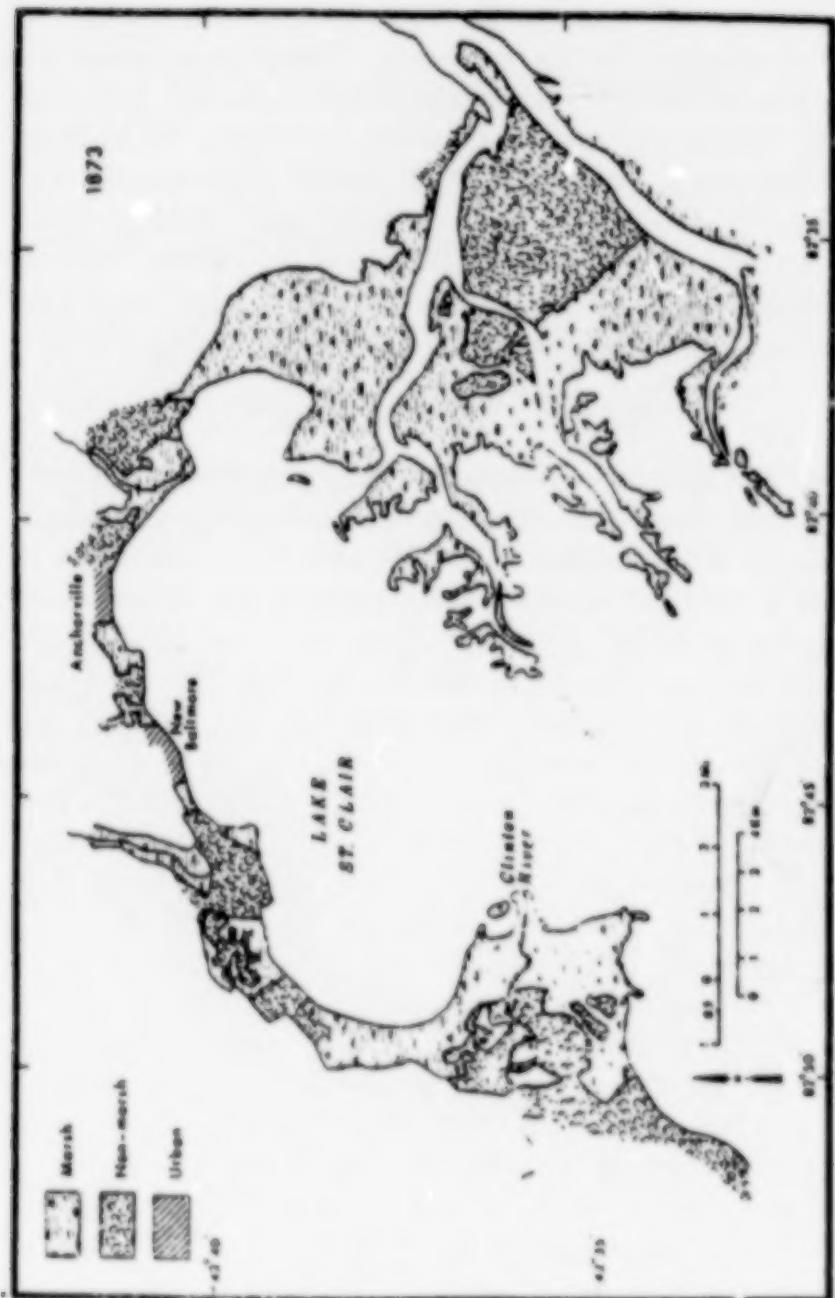


FIG. 1. Extent of wetlands in Lake St. Clair, 1873.



FIG. 2. Remaining wetlands in Lake St. Clair, 1973.

marshes of Lake St. Clair represented only some 5,000 acres. Urban expansion into the Clinton River delta and linear settlement along the lake front is clearly evident. Also, residential expansion onto the natural levees and deltaic plain of the St. Clair River delta has contributed to the permanent loss of wetlands. At present, 16,200 acres of coastal Lake St. Clair may be classified as urban. On Harsens Island much of the lower portion of the interdistributary marsh has been diked and planted with corn and other crops to attract migratory waterfowl.

The St. Clair delta represents one of the largest coastal wetlands in the state. Basically it is composed of two deltas: the first, of modern age, is deposited near the present lake level and is colonized by marsh vegetation; the other is a geologically older, gently sloping delta approximately 5 feet above the modern delta and is covered by deciduous hardwoods. Two vegetation transects in the delta were made in 1972 and 1974 during a period of rising lake level (Figure 3). As inundation occurred over the two-year period, the higher dogwood meadow was eventually invaded by sedges. The sedges in turn were replaced by cattails, which became the dominant wetland vegetation of the deltaic plain. Also, the transgressive beaches along the shorelines were gradually inundated by the rising waters of the lake and colonized by cattails. Therefore, with rising lake level, the wetlands of the modern delta are displaced landward. \* \* \*

\* \* \* \*

#### EXCERPTS FROM DEFENDANT'S EXHIBIT 28

United States Department of Agriculture,  
*Soil Survey of Macomb County, Michigan* (1971)

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[3] 5. Lenawee-Corunna-Lamson association

*Nearly level, poorly drained soils that have a moderately fine textured to moderately coarse textured subsoil; on lake plains*

This association is made up of poorly drained, nearly level soils that formed in lake-laid sediments and other sediments. It is on lake plains throughout the southern half of the county where the relief is slightly depressional to gently sloping. This association covers about 20 percent of the county.

Lenawee soils make up about 40 percent of this association, Corunna soils 30 percent, and Lamson soils 10 percent. \* \* \*

[4] \* \* \* Lamson soils have fine sandy loam in the surface layer and subsoil. \* \* \*

This association is well suited to crops. The water table is high, however, and drainage is the chief management problem. Water ponds in low places and hinders farmwork in spring and after rains. Drainage is difficult in some places because suitable outlets are lacking.

Most of this association has severe limitations for use as residential and recreational areas. The high water table and poor surface drainage cause difficulty in laying out streets and utility lines and in constructing houses.

[24] Lamson fine sandy loam (0 to 2 percent slopes) (La).—This soil occurs throughout the county. Some areas are in depressions. Runoff is very slow or ponded, permeability is moderately slow, infiltration is moderate, and the available moisture capacity is high. The water table is at or near the surface much of the year.

\* \* \*

This soil is used largely for corn, small grain, hay, and pasture. Some areas are idle or are wooded. Limitations are moderate to severe because of the high water table. Artificial drainage is a major management requirement for all uses of this soil. Drained areas have higher yields than undrained ones. Drainage ditches should be dug when the soil is dry because of its unstableness when wet. Tile blinding to prevent plugging by the fine soil material is often necessary because this soil flows when wet. This soil dries out later in spring and after rain than the better drained, similar-textured Sisson and Minoa soils. Management that provides a regular supply of organic matter helps to control soil blowing and to improve soil structure. If wet, this soil has poor trafficability, and the surface becomes cloddy when worked. Capability unit IIw-6(3c); woodland suitability group S.

\* \* \* \*

[49] Capability grouping shows, in a general way, the suitability of soils for most kinds of field crops.

\* \* \* \*

Class II soils have moderate limitations that reduce the choice of plants or that require moderate conservation practices.

\* \* \* \*

[The letter] *w* shows that water in or on the soil interferes with plant growth or cultivation (in some soils the wetness can be partly corrected by artificial drainage);

TABLE 2.—Predicted average yields per acre of crops under two levels of management  
[Yields in column A are those to be expected under common management; yields in columns B are those to be expected under improved management.  
Dashes indicate that the soil is not suited to the crop specified, or that the crop ordinarily is not grown]

Soil	Corn										Soybeans					
	For grain		For silage		Oats		Wheat		Alfalfa		Mixed hay		Field beans			
	Bu.	Bu.	Tons	Tons	Bu.	Bu.	Bu.	Bu.	Tons	Tons	Bu.	Bu.	Bu.	Bu.	Bu.	Bu.
Au Gres sand, 0 to 6 percent slopes	26	45	4	8	20	40	16	25	1.3	2.1	0.7	1.6	—	—	—	—
Au Gres sand, loamy substratum, 0 to 6 percent slopes	25	45	4	8	20	40	16	25	1.3	2.1	0.8	1.7	—	—	—	—
Blount loam, 0 to 2 percent slopes	65	90	12	15	40	80	35	45	2.2	4.2	2.0	2.8	20	30	25	35
Blount loam, 2 to 6 percent slopes	65	90	12	15	40	80	35	45	2.2	4.2	2.0	2.8	20	30	25	35
Boyer loamy sand, 0 to 2 percent slopes	35	65	6	11	30	50	25	40	2.0	3.0	1.0	1.8	—	—	—	—
Boyer loamy sand, 2 to 6 percent slopes	35	65	6	11	30	50	25	40	2.0	3.0	1.0	1.8	—	—	—	—
Boyer loamy sand, 6 to 12 percent slopes	32	60	5	10	27	45	20	35	2.0	3.0	1.0	1.8	—	—	—	—
Boyer sand and loam, 0 to 2 percent slopes	40	70	7	12	32	60	25	40	2.0	3.0	1.2	2.0	—	—	—	—
Boyer sandy loam, 2 to 6 percent slopes	40	70	7	12	32	60	25	40	2.0	3.0	1.2	2.0	—	—	—	—
Boyer sandy loam, 6 to 12 percent slopes	35	65	6	11	25	55	20	35	2.0	3.0	1.2	2.0	—	—	—	—
Boyer sandy loam, 12 to 18 percent slopes	32	60	5	10	25	50	19	30	2.0	3.0	1.2	2.0	—	—	—	—
Boyer sandy loam, 18 to 25 percent slopes	—	—	—	—	—	—	—	—	—	—	.6	1.2	—	—	—	—
Boyer gravelly loamy sand, loamy subsoil variant, 2 to 6 percent slopes	35	65	6	11	30	60	25	40	2.0	3.0	1.2	2.0	—	—	—	—
Brevort-Selfridge complex	30	65	5	11	30	50	17	35	1.4	2.5	—	—	—	—	—	—
Celina loam, 0 to 2 percent slopes	55	95	10	16	56	75	35	45	3.5	4.5	2.0	3.5	14	25	20	30
Celina loam, 2 to 6 percent slopes	55	95	10	16	55	75	35	45	3.5	4.5	2.0	3.5	14	25	20	30
Ceresco fine sandy loam	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Cohoctah fine sand loam	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Conover loam, 0 to 2 percent slopes	60	100	11	17	55	80	35	55	2.7	5.0	2.0	3.5	20	35	23	35
Conover loam, 2 to 6 percent slopes	60	100	9	14	45	70	25	45	3.5	7.0	2.5	4.2	18	27	22	32
Crcunna sandy loam	55	90	10	15	50	80	35	45	2.5	4.2	2.0	2.8	20	35	20	35
Del Rey loam, 0 to 2 percent slopes	55	90	10	15	50	80	35	45	2.5	4.2	2.0	2.8	20	35	20	35
Del Rey-Metamora sandy loam, 0 to 2 percent slopes	50	85	9	14	45	75	30	45	2.3	4.0	1.8	2.6	18	30	20	32

TABLE 2—Continued

Soil	Corn												Field beans												
	For grain			For silage			Oats			Wheat			Alfalfa			Mixed hay			Soy-beans						
	A	B	Bu.	A	B	Bu.	Tons	Tons	Bu.	A	B	Bu.	Tons	Tons	Bu.	A	B	Bu.	A	B	Bu.	A	B	Bu.	
Del Rey-Metamora sandy loama, 2 to 6 percent slopes	50	85	9	14	45	75	30	45	2.3	4.0	1.8	2.5	1.8	30	20	32									
Dryden sandy loam, 0 to 2 percent slopes	45	85	8	14	45	65	35	50	2.5	4.0	1.5	2.5	1.5	25	25	35									
Dryden sandy loam, 2 to 6 percent slopes	45	85	8	14	45	65	35	50	2.5	4.0	1.5	2.5	1.5	25	25	35									
Edwards muck	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Enzley-Parkhill complex	55	100	10	17	50	80	25	50	2.0	4.5	1.8	3.0	1.2	2.8	—	—	—	—	—	—	—	—	20	32	
Fulton sandy loam, 0 to 2 percent slopes	35	80	6	13	40	65	25	40	1.5	3.0	1.2	2.8	—	—	—	—	—	—	—	—	—	—	—	20	32
Fulton loam, 0 to 2 percent slopes	35	80	6	13	40	65	25	40	1.5	3.0	1.2	2.8	—	—	—	—	—	—	—	—	—	—	—	20	30
Gifford sandy loam	40	75	7	12	35	60	25	35	1.8	3.0	1.5	2.5	—	—	—	—	—	—	—	—	—	—	—	22	33
Gifford sandy loam, silty subsoil variant	40	80	7	13	35	65	25	40	1.8	3.0	1.7	2.7	—	—	—	—	—	—	—	—	—	—	—	14	22
Granby loamy fine sand	20	65	3	11	20	45	15	30	1.2	2.2	.8	1.7	—	—	—	—	—	—	—	—	—	—	—	20	35
Hartville clay loam	35	90	6	15	40	70	25	45	1.5	3.5	1.5	3.0	—	—	—	—	—	—	—	—	—	—	—	20	30
Lansom fine sandy loam	45	95	8	16	40	70	25	45	2.3	3.5	1.8	2.5	1.5	2.5	—	—	—	—	—	—	—	—	—	20	30
Lapeer sandy loam, 2 to 6 percent slopes	45	85	8	14	45	65	30	40	2.5	4.0	1.3	2.8	—	—	—	—	—	—	—	—	—	—	—	22	33
Lapeer sandy loam, 6 to 12 percent slopes	40	80	7	14	40	60	25	35	2.2	3.5	1.3	2.8	8	16	20	30									
Lapeer sandy loam, 12 to 18 percent slopes	35	70	6	12	35	55	20	30	1.8	3.0	1.0	1.8	—	—	—	—	—	—	—	—	—	—	—	20	35
Lapeer sandy loam, 18 to 25 percent slopes	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	35
Lenawee clay loam	50	100	9	17	45	80	30	55	2.0	5.0	2.0	3.0	15	35	25										
Lenawee-Selfridge complex	45	70	8	12	35	60	25	50	2.0	4.0	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
Linwood muck	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
Locke sandy loam, 0 to 2 percent slopes	55	90	10	15	50	70	30	50	2.2	4.0	1.5	3.0	16	25	20										
Locke sandy loam, 2 to 6 percent slopes	55	90	10	15	50	70	30	50	2.2	4.0	1.5	3.0	16	25	20										
Locke very cobbley sandy loam, 0 to 6 percent slopes	40	60	7	10	30	55	20	35	1.4	2.0	1.0	1.7	—	—	—	—	—	—	—	—	—	—	—		
Lupton muck	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—		
Made land	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—		

## [64] Wildlife

Table 3 [pp. 66-67] rates the soils according to their suitability for elements of wildlife habitat and for general kinds of wildlife. A rating of *well-suited* means that the soil is relatively free of limitations or that the limitations are easily overcome. *Suited* means that the limitations need to be recognized, but that they can be overcome by good management and careful design. *Poorly suited* means that limitations are severe enough to make use of the soil questionable for wildlife habitat. [In Table 3 Lansom soil is rated as well-suited in the categories of wetland food and cover plants, shallow water developments, excavated ponds, and wetland wildlife; it is rated poorly suited in the category of grain and seed crops and; it is rated suited in the categories of grasses and legumes, wild herbaceous upland plants, hardwood plants, coniferous plants, openland wildlife, and woodland wildlife.]

[65] *Wetland food and cover plants.*—These are plants that grow in moist or wet sites and that provide food and cover for waterfowl and furbearing animals. Examples are cattails, sedges, bulrushes, smartweed, wild millet, water plantain, wildrice, arrowhead, pondweed, pickerelweed, wildcelery, duckweed, and burreed.

\* \* \* \*

*Wetland wildlife.*—In this group are birds and mammals that normally frequent such wet areas as ponds, marshes, and swamps. Examples are muskrat, duck, geese, heron, rail, kingfisher, mink, crane, and bittern.

## EXCERPTS FROM THE TRIAL TRANSCRIPT

January 13, 1977

[5] HAL F. HARRINGTON,

was thereupon called as a witness herein, and having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. BEHRINGER:

Q Would you please state your name?

A Hal F. Harrington.

Q Where are you presently employed?

A I am presently employed with the U.S. Army Corps of Engineers, Detroit District, Environmental Branch.

\* \* \* \*

[16] THE COURT: Just so I am clear, you are saying that all of the area that was to the south and east of the fill, without exception, was wetlands.

A Then I could see driving in on the road looking off to the south and the east of the fill was a wetland.

THE COURT: And then you stopped at the place where you marked 1.

A Yes, we parked down here and met.

THE COURT: That is not at 1. That is not at 1. You parked and met at 2. Put 2 down there.

A Two.

We then drove along a roadway that was being used as a haul roadway for trucks coming in and dumping fill and parked in the vicinity of No. 1, met with the Defendants, looked out across the fill operations and in walking to the edge of the fill, the fill went right up to what was wetlands and what was underneath the fill operation occurring in this section was wetlands.

[17] THE COURT: By this section you are referring to a line I would like you to mark 3.

A The bulldozer was operating, pushing dirt into this area and the trucks were backing up and dumping dirt which was being leveled with a bulldozer.

THE COURT: I have no further questions. I just wanted to know the general area.

Q (By Mr. Behringer, continuing): Did you look to the east and southeast?

THE COURT: From Point 1, do you mean?

Q (By Mr. Behringer, continuing): From either point, from the boundary line of the dumping or Point 1 or both to study the area beyond the immediate edge of the fill operation?

A Yes, I did. From Site 1 I looked across the east and from Site 1 I also walked towards the south edge of the fill, which I will mark 4, and examined the site of the fill immediately to the south and east from approximately that position of No. 4.

The bulldozer was operating right at No. 3 with the trucks driving in, backing up and dumping and I did not want to walk into that zone to go right to the edge of the fill at 3.

Q Now you mentioned that there were trees and shrubs in addition to cattails and other vegetation plants in that area, is that correct?

[18] A Yes, there were.

Q Would the existence of those trees and shrubs have any mitigating effect on your determination that this was wetlands that was being filled?

A No, it would not.

Q Is it correct that there are, that there can be micro zones of different types—

THE COURT: Let's ask the witness why not instead of testifying.

MR. BEHRINGER: I'm sorry, your Honor.

Q (By Mr. Behringer, continuing): Why not, if you could explain?

A Why not the trees and shrubs?

Q Yes, sir.

A There are many types of wetlands. The United States Fish and Wild Life Service has prepared a circular, Circular No. 39, and other publications which define wetlands. It's widely used in the United States. In fact, it's probably the most common usage of wetland classification in the United States. Since it is a U.S. Fish and Wild Life publication of the Department of the Interior they are much more familiar with it.

They do have many types of wetlands that go all the way from the open marsh, they have areas that are dominated by emergent vegetation, you have submerged vegetation, and emergent vegetation, shrubs, saplings, all these are different types of wetlands that are recognized [19] nation-wide.

I might point out that in between some of these shrubs ice was formed. There was a shrub and then two or three or four feet away there was another shrub. I believe some of these were tag elders. During the normal summertime when the snow would melt it would lay there on the top of the surface and you would find duck weed, an aquatic plant that grows on there. You would find aquatic vegetation which would grow in the places between the shrubs and plants, or shrubs and trees that come up.

THE COURT: Did you notice any other kind of trees, that is, a particular kind of tree?

A We did not make a determination at that time of what specifically was there. Based on viewing other wetland areas across the State of Michigan these shrubs and trees would be of a general characteristic. This would be classified as a wetland area particularly with the frozen ice which was there and at that time, looking at that, you got shrubs, you've got trees, you've got cattails, you could make a specific determination if you went in there and collected samples. You could do it in a number of ways. You could do a stem count, a bio assay, or aerial coverage if that was required. I was asked to determine if it was a wetland and it is a wetland beyond any doubt in my mind.

\* \* \* \*

[20] Q Was the soil saturated?

A There was frozen water. There was ice at the area of fill. The vegetation that was found there is characterized by [21] requiring a saturated soil, at least a portion of the year, to grow. If it didn't have that saturated soil over a given length of time necessary for growth and reproduction, you would not have that vegetation at the site.

THE COURT: What particular vegetation?

A Say, cattails, some of these, if it was tag elders or red osier, the types of—

THE COURT: Tag elders require saturation a portion of the year?

A That is correct.

Cattails require saturation. Duck weed that would be characteristic of open areas during the summer months has to have water or it isn't there.

\* \* \* \*

#### CROSS EXAMINATION

BY MR DANK:

[32] Q Are you the only aquatic biologist who looked at this property as an employee of the Army Corps of Engineers, to your knowledge?

A To my knowledge I am.

Q Your testimony is that the first time that you were asked to look at it was on the 5th of January of this year, is that correct?

A In a capacity to determine if it was in fact a wetland, that is correct.

Q Now who specifically asked you if you would make this determination?

A Mr. Richard Sides of the General Regulatory branch. He came over to our office and he said, I would like you to go on a field site inspection and meeting with me on the 5th of January. He went to my supervisor and it was arranged to [33] go on an on-site inspection.

Q What time did you go to the site?

A This was in the morning, nine or ten o'clock roughly.

Q Did you drive there?

A Yes, we did.

Q Then you subsequently got to an airplane and you flew over it, is that correct?

A That is correct.

Q What time did you conclude your inspection of the property?

A I believe the flight was concluded approximately 2:00 P.M. on the afternoon of the 5th of January.

Q How long would you say that your actual physical inspection of this site took place?

A Five minutes.

Q Five minutes?

A Yes.

THE COURT: Are you talking about when you were on the land now?

A That was on the land.

Q (By Mr. Dank, continuing): Did you accumulate any samples while you were on the site?

A I did not ask permission to collect samples, no, sir. I did not accumulate any.

\* \* \* \*

[38] Q We have established that you do not have established that you do not have any positive knowledge about the shrubs and trees, is that not so?

A That is correct.

Q The only positive knowledge that you bring to this courtroom is that there were cattails, is that correct.

A That is so.

Q When Mr. Behringer was asking you about the period of time that it takes to develop a wetland you, I believe, characterized it as a rapid, is that correct?

A It can be rapid. If you get standing water you can get algae it can grow. That is an aquatic plant. You get cattails that come in rather rapidly in many cases.

Q Within a year?

A In some cases you could have cattails if you had an area that was flooded, if it was saturated that year, the following year you could start to get cattails. You will notice that on farm ponds they dig a farm pond and along the edges in a year, two years, you start seeing cattails along the edges of those farm ponds.

\* \* \* \*

[50] Q (By Mr. Dank, continuing): My question is, I am assuming that this is the property lying here just immediately east of Jefferson and south of Clinton Road; can you from that photograph [DX 26: xerox copy of 1940 aerial photograph] identify what use is being made of the property?

A The specific use?

Q Yes.

A Portions are divided off in rectangular type parcels. This is immediately east of Jefferson Avenue and based on the divisions I would believe portions are being farmed.

\* \* \* \*

January 15, 1977

## [6] REDIRECT EXAMINATION

BY MR. BEHRINGER:

Q Mr. Harrington, did you visit the site of the land fill and the property involved in this litigation yesterday?

A Yes.

Q Did you attempt to conduct any studies on that site?

A Yes.

Q Could you tell us what results, if any, you may have found and how you found those results?

A We broke up into teams. One team walked the face of the fill and the second team walked, oh, approximately 50 to 100 yards from the face of the fill. We collected representative samples in the area or every different type of plant we could identify or that was different we col-

lected a sample. The samples are in front of me now.

We went, the first bag went from the [7] east side of the fill southward, and the second bag was along the south face of the fill.

MR. DANK: Would you go over that again. I can't write as fast as you can talk.

The first bag was collected where?

A The bag on my left—

THE COURT: Are those marked?

MR. BEHRINGER: No, they are not.

THE COURT: Let's mark them so we are not talking about bags on the right and left.

A I have them marked as Bag 1 and 2.

THE COURT: Would you refer to them that way instead of right and left.

A Bag No. 1 was collected on the east side of the fill, and the second bag was collected on the south side of the fill.

Q (By Mr. Behringer, continuing): Now with regard to Bag No. 1, how near to the fill were those samples taken?

A The samples were taken from right at the toe of the fill out, oh, approximately 10 to 15 feet. Whatever was at the toe of the fill we did collect. It was rather brushy in areas going through there and so you had to walk out a way from the toe of the fill to get through the brush.

Q What type of samples did you collect?

A These were samples that were above the ice and snow line.

Q Could you tell us what conclusion, if any, you came to or you [8] may have drawn from those samples?

A From the samples that were collected, I still determine that it's a wetland area.

Q Which samples support that determination, if any?

A Bag No. 1 and Bag No. 2.

Q Could you specify any particular items in the bags?

A In the bags we have—

THE COURT: Let's take them separately, if you will, please.

Begin with No. 1.

A Bag No. 1, the shrubs, shrubbery on the east side of the fill. Bag No. 1 the predominant shrubbery was a red osier dogwood and a willow, some of it was a pussy willow. Interspersed with that was cattail narrow leaf type, a small clump of broad leaf cattail, some phragmites.

THE COURT: How do you spell that?

A P-h-r-a-g-m-i-t-e-s.

Marsh grasses, numerous other vegetation.

Q (By Mr. Behringer, continuing): Would you specify the other kinds?

A I have a listing, a partial listing of the other kinds.

Q Would you please go through the list?

A On the east side there was a small amount of ash, some elm, red maple, cottonwood, spirea, carax which is a sedge, and [9] again, we still have the willows and red osier dogwoods.

THE COURT: Let me ask to be sure I understand.

The ash, the elm, the red maple, cottonwood and sedge would not be wetland?

A No, all of these are capable of living in either wetland areas or areas that are moist, damp and some are found only in wetland areas or wet areas.

THE COURT: Let's separate the ones that are only found in wetlands, if we can, it would be better for me.

A They are all a wetland type. They can all be found in wetlands. The cattail is definitely wetland. The marsh grasses are wetlands. The carax is a wet area vegetation type.

THE COURT: How do you spell that?

A C-a-r-a-x, I believe, if I've got it right.

THE COURT: What about red osier dogwood, is that primarily found only in wetland?

A It's an indicator of wetland conditions, along with the willows, the pussy willows.

THE COURT: The cims, the maples and cottonwoods, not necessarily in wetlands, is that correct?

A They prefer a moist soil. They can live in a moist soil, I will put it that way, and if you get it too moist they could die out, yes.

\* \* \* \*

[11] Q Now with regards to your walk along the east side of the face of the fill, did you see anything in the course of that walk which would conflict with your determination that this was in fact a wetlands?

A No, nothing really.

Q Now you testified that in addition to walking along the east side you also took a walk along the south side of the fill?

A Yes.

Q Did you collect Bag No. 2 during that walk?

A Yes.

Q What if anything, did you collect in Bag No. 2, if you can describe the particulars in that bag?

A Well, the bulk or just immediately as you made the turn and headed west there was a similar type environment. There was some red osier, the willows and I believe there is a stand of gray dogwood and then it opened up into a, well, wet night shade and a rose with the red berries, and then it opened up into an extensive cattail type wetland which was an extensive [12] cattail marsh.

\* \* \* \*

#### RE-CROSS EXAMINATION

BY MR. DANK:

[25] Q Did anybody try to determine the type of soil they were, the type of soil the samples were?

A I do not know if anybody did an actual determination. They appeared to be muck.

Q They appeared to be muck?

A Black organic decomposed plant matter.

Q Did that play any part in your passing judgment on this property being a wetland?

A No.

Q Not at all?

A The vegetation that was there was a wetlandish type vegetation.

Q Let me ask you this, witness, is it your definition of wetland that if there was water on it it's a wetland?

A If it is an area that is capable of supporting wetland vegetation it would be wetland.

Q Now in order to have property capable of that you would have to have water on it for some period of time, isn't that correct?

A Well, either water on it or a saturated soil for some period of time.

Q It's absolutely impossible to make the characterization of wetland of any property without having it, wet either through saturation or otherwise for some period of time, isn't that so?

A Some period.

[26] Q What period is important to you, witness, in making that determination?

A Wetland vegetation.

Q So if wetland vegetation can grow then that would satisfy your qualification or your classification, is that correct?

A If you are looking at a wetland, yes. If it has wetland vegetation it's a wetland.

Q You are looking at wetlands to define wetlands?

A I am looking at wetland vegetation.

Q If you can grow wetland vegetation in four months then four months is all you need to satisfy your definition of wetlands, isn't that true?

A Yes.

Q And that would be true as far as your definition will permit even though in its entire history it had never been wet prior to the six months.

THE COURT: I don't think he indicated that it could be done in six months. Perhaps you ought to make the example more in accordance with his testimony.

MR. DANK: He indicated a year for vegetation to grow.

Q (By Mr. Dank, continuing): Have you said a year?

A You could start a marsh in a year. If an extensive marsh is there it would take more than a year.

\* \* \* \*

[30] RE-DIRECT EXAMINATION

BY MR. BEHRINGER:

Q Can property described by a biologist as wetlands be farmed or used for agricultural purposes?

A Yes.

Q And if such a condition does happen, that is wetland's are used for some agricultural purpose, when the agricultural use ceases, is it possible that the wet, or that the lands would revert back to wetland status?

A Yes, sir.

MR. BEHRINGER: No further questions.

THE COURT: I have a question.

You said in order to be a wetland it had to be saturated or flooded for a certain portion of the year. Is there any minimum or maximum, minimum on that I should say?

A Well, it would be during the growing season which is usually your spring and summer when your plants put on growth for at least a period of a year and then depending on the vegetation that is there. It it's saturated for a longer portion of the year or its's flooded with six or eight inches of water, or ten inches of water, will determine what type of vegetation will grow there. Some may require saturation year round. Others only three or four months which is still, if the water that is needed for the plant growth but other plants, even [31] if they had much saturation would die out. There is many types of wetlands and it requires saturation for growth and reproduction.

THE COURT: Just let me ask you, since you said there were an awful lot of cattails here, how many months of the year would the cattails have to have a

saturated soil? How long can cattails remain if they don't have saturated soil, if you know?

A Offhand specifically I do not know that.

THE COURT: They could have a period when there wasn't saturation and still continue at least for a while.

A For a period of time.

THE COURT: Then they would require to be saturated again.

A Right, or if they got, they can die off, too, by having too much saturation. If you get inundated with water completely, three or four foot of water over them they could die. Then you would go to a different type of wetland vegetation, something that would be submerged completely or you could go to that.

THE COURT: Now you indicated that it is possible to farm land which in its natural state would be a wetland. Would there be a limitation of the type of crops that you could grow on that land?

[32] A Well, you would have to have a drainage system there of some type. You could grow wild rice or something like that.

THE COURT: In other words, you are indicating that you could farm it with a drainage system.

A There are many many areas that are drained and farmed.

THE COURT: But you couldn't farm it without some drainage, at least not in wet years.

A It would be pretty rough because, it would be wet for such a long period of time you could never to plant your crops. You could still harvest them.

\* \* \* \*

[36] DAVID A. ALLARDYCE

[Field Biologist for the United States  
Fish and Wildlife Service]

was thereupon called as a witness herein, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION  
BY MR. BEHRINGER:

\* \* \* \*

[43] Q (By Mr. Behringer, continuing): I believe you have pointed out the operation Forsight Dike on this exhibit [an aerial photograph dated September 9, 1974]. Can you point out approximately what area has been filled at the present time on this exhibit?

A To the best of my knowledge, the area that we observed yesterday that has been filled is approximately from this corner near the road, South River Road on across actually back over in this area, a line roughly like so.

Q Can you tell from that exhibit what type of characteristics we have within the filled area?

A Very briefly we recognize several classes of wetlands. These can be divided into sub classes. From aerial photographs we can tell or describe a general wetland class. From the water area that you can see in here we know that it's either a shallow water or deep water marsh depending on water depths. You can see the water in here almost to the Forsight Dike in blue patches. The blue patches of water are clearly obvious there, almost up to the Forsight Dike.

MR. BERHINGER: I am going to move on to another exhibit.

THE COURT: Or can we bring them back, if you like, either way. In other words, you can wait until they are all shown and have them again or ask the questions about the picture as you see one, whichever way you want to do.

MR. DANK: Why don't we let it go and [44] have him complete the presentation and then I will go back over them.

A Basically the same photograph. It's basically the same photograph showing a little more of the river to the north of this area.

Again, basically the same photograph. I probably should point out here, when I was talking about classes of wetlands before here, we can pretty much tell we have cattails in here from looking at this vegetation pattern. We have patches of open water.

This very light green material is an aquatic plant we call duck green. It's a species of plant highly used for migratory waterfowl, excellent food.

\* \* \* \*

[51] Q Now with regard to Station No. 1—strike that. What is your definition of wetlands?

A A wetland is, as the Fish and Wild Life Service defines it, is characterized as land where the dominating factor is water which determines the type of soil, and the type of plant, and animal communities that exist at the soil surface, and more specifically it could be described as land where the water table is at, near, or above the surface of the soil for a sufficient period of time in the year to delineate what types of plant and animal communities would exist or be able to exist under specific conditions.

Q How many different stations did you mark on your map as having stopped at?

A We had approximately 12 or 13, about 12 stations.

Q Speaking specifically with regard to each station, was each station a wetland in your determination?

A Yes, I would say so based on the plant associations that we saw there.

Q Conversely, would you have determined that any of the stations were in fact in upland or anything other than a wetland?

[52] A No. All of the plants, species of plants existing on the site are characteristic of a particular class of wetland.

THE COURT: What class or different classes?

A During our inspection of the site we could determine probably the major class of wetland out there would be

either a Type 3 which we call a shallow marsh or a Type 4, deep water marsh, depending on water levels.

Of course, this fluxuates periodically. In areas where you have your red osier dogwood, your willows, this type of shrub, this is another classification known as a shrub community, a shrub wetland.

Then near the road, on the east near River Road, the northeast section or area of the fill, there is an area in there that you could characterize, as I mentioned before, as basically very close to a wetland meadow type of situation, Stations 1 and 2 approximately.

And then as you go around to the south, proceed in a southerly directly then you get more into A, as I say, a Type 3 or Type 4 marsh which is, the predominant vegetation is your narrow cattail, phragmites, what we call a robust emergent type of vegetation.

Q Did you take any soil samples in the course of your walk?

A Yes, we did.

Q Is that soil sample or any of them here with you in court [53] today?

A We have the one sample with us today, yes.

Q Is that what we have marked as Exhibit No. 48?

A Yes, it is.

Q Would you describe what significance, if any, you attribute to that soil sample?

A Well, a colloquially term for this would be called, it's called muck. Actually, it's an organic type of soil, a peat type soil. It's highly decomposed and as such we are unable to determine the various types of aquatic plants that make up, that are characteristic and make up a soil of this type.

Q Is that soil sample consistent with the type of soil you would find within your definition of a wetland?

A It is one type of soil, yes, definitely.

Q Now in addition to offering testimony with regards to plant habitat and the soil, did you have occasion to observe any animal or wild life usage of the parcel?

A Yes, we did. At several stations along the course of our route we very definitely sampled muskrat lodge densities.

THE COURT: You sampled what?

A Muskrat lodge densities. We would stand on top of one lodge and we would count the number of lodges we could see within approximately a 40 yard radius and I think we did this in three areas. At one point we observed at least 13 lodges within a 40 foot radius, another point seven or eight, and [54] another one ten.

THE COURT: Do you have those marked on your map where you made those observations?

A I have them marked not on the map but on my notes at each station, your Honor, where they were seen.

Q (By Mr. Behringer, continuing): Referring to your notes, could you tell this Court which three stations you made these muskrat observations?

THE COURT: That's within a 40 yard radius.

A Yes, 40 yard radius.

THE COURT: 40 yard radius.

A Yes.

Station 9 I have muskrat lodges listed as numerous there. I did not give a number.

At station, what we called F 100, this was at a stake in that area, we listed eight to 10 within a 40 yard radius.

I have another note here somewhere that has as high as 13.

THE COURT: Stake F 100, is that on your map?

A Yes, I have it marked on the map.

At another station called the Grade Flag we observed seven to eight muskrat lodges within that [55] 40 yard radius.

Q (By Mr. Behringer, continuing): Mr. Allardye, do you recall—

THE COURT: I'm not sure if he is finished.

A There was one other station here where we had approximately 13. I believe it was Station 9 but I'm

not sure. I don't see it listed on here. It may have been Station 9, I'm not sure.

In addition to this we also observed the nests of what we call the long billed marsh wren and there were several of these throughout the course of our walk. They are difficult to determine the number on because they are camouflage with the cattails or attached to cattail material but these were numerous and, of course these indicate heavy use of this area by this particular species of bird which will not nest anywhere else but in this type of marsh situation.

\* \* \* \*

[57] Q Were you able to see muskrat lodges from any particular point on the toe of the dumping?

A The only time I stood on the toe of the fill was in our proceeding to our area that we wanted to test. I did not see any, no, I did not see any muskrat lodges from that toe, standing on the toe of the fill.

\* \* \* \*

#### CROSS EXAMINATION

BY MR. DANK:

\* \* \* \*

[76] THE COURT: Just so I understand this exhibit.

A This indicates the low water datum here. This is the low water datum.

THE COURT: For this particular lake.

A For this particular lake, Lake St. Clair.

THE COURT: That's for this period of [77] time shown on this particular chart.

. A Yes, from 1920 through 1972. You can see how erratic the water levels, how much they fluctuate and as they fluctuate your vegetation patterns are going to change.

THE COURT: These are the high.

A Yes, these are the high peaks. They represent the high. The observation is above low water datum. This

is a good example right here, you see this fluctuation of water levels through the years and why vegetation patterns change because of the erratic movement and this is why your shorelines are not static on the Great Lakes. They cannot be managed in that way.

Q (By Mr. Dank, continuing): I am again going to show you Exhibit 22, not again, I am going to show you Exhibit 22 and ask you whether or not this was one of the survey maps that you studied to acquaint yourself with the facts prior to coming here?

A It looks very familiar, yes. The specific date is 1952. I would say that's entirely possible that this might be one of the surveys.

Q Now I am going to ask you if you can locate the subject property on this map.

A Approximately in this area.

Q Well, can you locate Jefferson Avenue?

A I believe this is Jefferson right here.

[78] Q Where would the property be, if you can identify it?

A Right in here. Just lakeward of this green area.

MR. DANK: I think the record should reflect you are pointing lakeward of a green area.

A Yes.

Q (By Mr. Dank, continuing): What does green area mean?

A Generally a green area means forested area.

Q Woods, right?

A Right.

Q Mature trees?

A That is correct.

Q So the map which was compiled in 1952 and I believe says is based upon photographic information obtained-topography by plane table surveys 1952, so the pictures were '51, and plane surveys in '52 would indicate what with relation to a marsh area, a wetland and this particular property?

A This would indicate that the property in question is indeed a wetland.

Q Show me the property again?

A Right here in front of this green area.

Q Isn't it true, witness, that the property lies alongside Jefferson Avenue and is this piece in here?

A No, I am talking about the area that is being filled presently.

Q That's how you know it, you know it to be east of this red [80] line, that is, east of Jefferson?

A Judging by the proximity of South River Road also and from what I saw out there yesterday, I would say yes.

Let me have a pencil here and I will show you exactly where I am. Right in there. That's the area I understand to be the present fill area and as such it's a wetland. There is no question about it.

Q I wonder if you will tell us—

THE COURT: Maybe he could put his initials there in case somebody else draws on there.

MR. DANK: Put your initials alongside. Put it on the north of Clinton River there alongside of your mark.

Q (By Mr. Dank, continuing): Now let's take a look again at Exhibit 20 and see if you can tell us what the water levels were in the years 1951 and '52, the years that the data was compiled to make this chart?

A In '51 and '52, you were up approximately 575.7 feet which would be, again, about 4.7 feet, something like that, above low water datum.

Q Do you know what the level was in 1963 when it peaked out and reached its 100 year high?

MR. BEHRINGER: Excuse me.

Your Honor, I am going to object to that.

[81] MR. DANK: '73, I'm sorry.

MR. BEHRINGER: That question, again, is over testimony of counsel when it peaked out in the year.

THE COURT: Don't we have some exhibit here that has '73?

MR. BEHRINGER: I think it would be more correct that we put on a hydrologist. I would have one. I understand they have one. Rather than take these questions from a man from the United States Fish and Wild Life Service, I think it would be more correct that we put on a hydrologist.

THE COURT: Let's put the exhibit on. He wants to ask him a question about his expertise. We don't want to call this man back.

As a matter of fact, all the exhibits ought to be marked and received if they are official exhibits and not have this time wasted.

Obviously this witness isn't going to know when it was the highest but he wants to ask him a question about the effect of it.

MR. DANK: Do you have an Exhibit with '73 on it. This one goes from '72 to '74.

THE COURT: It skips '73?

MR. DANK: Yes.

MR. BEHRINGER: Your Honor, I would offer that this witness may not be competent to answer [82] questions with regard to high water mark.

THE COURT: He isn't going to be asked about whether it was or wasn't the high water mark. But he can surely be asked about the effects of it and whether the variations are significant. That's what I assume the purpose of these questions are. The charts will tell us when the high water marks were. I don't expect him to keep this information in his head.

MR. DANK: Mr. Kalt do you have the exhibit?

MR. KALT: This is from '75 to '77.

MR. DANK: Do you have something with the year '73 on it?

MR. KALT: You are requesting something of this nature?

MR. [BEHRINGER]: My problem is, your Honor, I feel that Mr. Dank is proving water datum through an expert witness on the premise that he is going to be ask-

ing him subsequent questions. I think it would be more appropriate to offer testimony as to the high water marks on one exhibit compared with this other exhibit from somebody qualified in those areas.

THE COURT: I will overrule your objection. If we had a pretrial in this case they would all be exhibits and we could use them. No one is going to come [83] in and testify that these official lake survey water heights are incorrect.

We ought to have a stipulation of what they are so we would know whether they were. We haven't had a pretrial so we can't get all these things that are disputed resolved. We ought to have a stipulation when the dike was built and things like that so we don't have to ask witnesses questions about it. Whenever it was built, it was built. That's what I hoped you would do yesterday is to reach some stipulation on some of these things to shorten the time.

MR. BEHRINGER: I understand that the witness wants to, or the Court wants testimony on the importance of fluctuations.

THE COURT: If it's going to be meaningful, it ought to be the kind of fluctuations that everybody admits exists. That is not a question in dispute.

MR. BEHRINGER: No, that's my whole point.

THE COURT: Then give the witness something he can tell me.

MR. DANK: This is Exhibit 52.

THE COURT: Do you have any objection to Exhibit 52, Mr. Behringer, which is United States Great Lakes-monthly levels of the Great Lakes?

[84] MR. BEHRINGER: If this is what was just presented, no objection, your Honor.

THE COURT: It may be received.

Q (By Mr. Dank, continuing): Witness, is this identical to the chart that you have been using known as Exhibit 20 with the exception that it does have the year '73 through '75 described thereon?

A Very similar, yes, I would say.

THE COURT: The other one was folded so he couldn't see it had the other lakes on it but it did.

Q (By Mr. Dank, continuing): Looking at Lake St. Clair for the year 1973, can you tell us how 1951 and '73 compare?

A Comparing '71 and '73?

Q I'm sorry, '51, 52 and '73, how would you compare those years?

A Of course, both high water periods but the years '73, '74 are slightly higher by maybe, it could be a foot perhaps, maybe not quite a foot. Both well above low water datum.

Q Could you say from looking at this map that the years 1973 and '74, the years—

THE COURT: Let's point to Lake St. Clair not Lake Erie.

MR. DANK: I'm sorry.

Q (By Mr. Dank, continuing): '73 and '74, '51 and '52 and 1929 are singularly the highest levels recorded in the 20th century on this graph.

[85] THE COURT: Better not say the 20th century because the other side has 1900 to 1919.

Q (By Mr. Dank, continuing): So it would be 55 years, is that correct?

A I would say those are the three high points, yes, no question about it from observing this chart.

\* \* \* \*

[96] Will a muskrat live in his hut for more than one year?

[97] A Yes, I would say definitely, as long as the primary food supply, which is cattail primarily, would remain in sufficient quantity.

Q How deep was the water where you broke the ice and went down and sampled the soil?

A The initial sample, the first sample we took which is the one we have in court today from our group, the water was frozen completely down to the soil and we

picked the soil out and squeezed it between our fingers, and we could tell it was saturated all the way down as far as we sampled.

THE COURT: How deep was the ice then?

A Well, the ice, maybe two or three, four inches thick, I would say.

Q (By Mr. Dank, continuing): Were you able to determine what the average level of the water was on this site?

A The only thing I can say is the samples we took, the ice was from two to four inches thick. That's about all I can testify to.

Q Do you have any information indicating that the water was ever more than four inches deep on this site?

A Yes, we do. We observed high water marks on the trees, the soft maples, cottonwoods and it appeared to be at least a foot above the ice.

\* \* \* \*

[111] Q How far is this property from the edge of Lake St. Clair at its nearest point, to your knowledge?

A About how far is the property or the fill site?

Q The fill site, well, the property itself, as it's marked in red, the nearest point to the lake can you figure out what that is?

A I don't know. It would be a half mile, maybe.

Q Pardon?

A About a half mile, maybe, three quarters of a mile.

What's the scale of the map here?

Q 600 feet.

A One inch equals 600 feet. You've got easily six inches there, that's 3600 feet, you are over half a mile, half to three quarters of a mile at this distance from here. However, not from your source of water in here.

THE COURT: By source of water in here what do you mean?

A The direction that the water would come, possibly come or could, not the only way but predominant.

Q (By Mr. Dank, continuing): We are talking of seiches now?

A Yes.

Q You think a seiche would come from this body of water up into this property?

A I think it would influence it, yes.

Q The wind would, you would have to admit, the wind would have to be coming from the southeast?

[112] A I would say either southeast or northeast.

Q Coming from the northeast would—

A I think possibly, in my mind, as I say, I'm not a hydrologist, a wind either from the northeast or from the southeasterly direction I think for a sufficient period of time and strong enough could cause a seiche of some magnitude.

Q I am confused.

A minute ago you said the wind from the northeast would move this water which is south and east of the property onto the property in a seiche?

A A seiche is not a current.

Q It's wind?

A No, it fills the water levels up along the entire lake shore. If the whole area is to rise then certainly if this area is lower and it appears to be so, then the water would flow and take the path of least resistance.

THE COURT: Through the canals and channels?

A Certainly.

THE COURT: Because the shoreline is three feet higher.

A Yes.

THE COURT: Or whatever?

A Yes.

Q (By Mr. Dank, continuing): Witness, would it not be a fair [113] statement then to say that if the lake level, either through a seiche or through its—whatever its level is at a particular time were to influence this land, then whatever the level of the lake is would have to be higher than the level of the property, isn't that true?

A I would guess. I think so, yes.

Q Do you know what the level of the property is?

A Not specifically, no.

Q You don't know whether or not the lake influences any water on this property at all of your actual knowledge, do you?

MR. BEHRINGER: Objection, your Honor.

I think he has indicated through the culverts of the Clinton River, through the canals and through Lake St. Clair. The question is argumentative.

THE COURT: I think the question has been asked and answered.

A I said twice before and I hold to that, Mr. Dank.

Q (By Mr. Dank, continuing): Explain to me how you can know without knowing what the elevation of this property is?

A I don't know of any other sources where the water would come from.

Q You don't?

A Lake St. Clair being the dominating factor, in my belief.

Q Whae other sources have you explored?

A In my opinion that one source is enough.

\* \* \* \*

[116] Q I am trying to establish when the water is at a level with the lake and can be influenced by the level of the lake.

A Fine, but we are talking about a wetland situation. The water doesn't have to be above the soil to have a wetland [117] situation. As long as the soil is moist you have a wetland.

Q Witness, I wonder if I can get the answer to my question.

Looking at Exhibit 34, would you say that this is identical to Exhibit 8 except this has some drawings that were put on there earlier?

A It looks very similar, yes.

Q Referring to 574.81 which is here, is that correct?

A Yes.

Q In other words, for the surface water to be influenced to this point by the lake, isn't it true that the lake would have to be 574 feet to get the water to this level?

A I would agree to that. I think so.

\* \* \* \*

[119] FRED F. SCHLEY,

was thereupon called as a witness herein, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

[120] BY MR. BEHRINGER:

Q Mr. Schley, are you familiar with the area that we have been discussing today?

A To the point of 16 years residence right next door to it.

Q Do you have a common name for this area?

A Well, we refer to it as the Vershave Marsh.

THE COURT: When you say you reside next to it, where are you referring to?

A Within a quarter mile.

THE COURT: Where on that map that is next to you?

A Where is Jefferson Avenue here?

We live just this side of Metropolitan Beach, two streets this side towards Detroit. In other words, that would be south of Metropolitan Beach. It's Harrison Township.

Q (By Mr. Behringer, continuing): Mr. Schley, have you ever had occasion to personally visit the Vershave Marsh during the course of filling operations?

A On one occasion, yes.

\* \* \* \*

[121] Q Have you ever seen the area you know as the Vershave Marsh used for agricultural purposes?

A No, I have not.

Q Would you be able on that map to indicate the area you know or you are referring to as the Vershave Marsh? Can you point it out to the judge?

A This is the construction zone so planned, is that correct?

Jefferson Avenue goes along here. Is this the property in question, this red line?

Q I asked you the question. I am really not—are you familiar with that map or able to describe the property?

A This section from approximately this line on over is what I referred to as the Vershave Marsh.

Q You are talking about an area that is both presently unfilled an area that is filled?

MR. DANK: Counsel is leading the witness, Your Honor.

THE COURT: I recognize he is.

A To answer your question, that's true.

Q (By Mr. Behringer, continuing): Have you seen any agricultural use of the area you have referred to as the Vershave Marsh in the last 16 years?

A No, sir, I have not.

Q Could you describe what use, if any, that land may have been [122] put to, to the best of your knowledge?

A Well, what we refer to, again, as the Vershave Marsh has been trapped for muskrat, also you will see in the early part of the spring and early summer a great deal of carp being speared by bow and arrow and this goes on all through the marsh area.

Q Would that spear fishing or carp fishing or the muskrat fishing occur only in periods when the lake is at high levels?

A In the 16 year period that I have lived there I have seen this spear fishing by means of bow and arrow going on every year.

THE COURT: He is asking you during the whole summer.

MR. BEHRINGER: No, I meant that was the answer I was searching for, your Honor. Thank you.

Q (By Mr. Behringer, continuing): Do you happen to know the names of any individuals who are actively trapping muskrats on that property?

A Yes, George Hauser traps muskrats.

Q Is there anybody else?

A Ralph Kent may have some traps in there. If he does not this year, he has trapped it in the past.

\* \* \* \*

[123] CROSS EXAMINATION

BY MR. DANK:

\* \* \* \*

[125] Q By Mr. Dank, continuing): Is there a drain, if you know, without reference to what its name is, at the southern most end of this property, the fill property in question?

A There is a pumping station down at that far end, way on this end which would be the south end, and there is a drainage ditch along there, yes.

Q Would the uses of the marsh that you have described, would they have been made south of that drain essentially?

A No, that is not correct.

Q North of that drain?

A North and east of it.

\* \* \* \*

[126] Q You don't have any knowledge of anybody ever using this property for agricultural purposes is your testimony, is that right?

A That is correct.

Q Mr. Hauser didn't tell you that he farmed this property, did he?

A No, he did not.

My only experience with the marsh, other than the 16 years, some 25 years ago I hunted duck in that marsh. That was the only time I had personal experience with it.

Q Can you tell us of your own knowledge that any of the uses that you have described, namely, the trapping of muskrats, the hunting of duck or the spearing of fish has

taken place specifically within the red line boundaries made on Exhibit No. 37?

A Yes, in this area back here particularly and down in this corner here.

THE COURT: The most southerly portion?

A That is correct.

\* \* \* \*

[128] VERNON B. LANG,

was thereupon called as a witness herein, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. BEHRINGER:

Q Would you please state your name?

[129] A My name is Vernon B. Lang.

Q Are you presently a fish and wild life biologist with the United States Fish and Wild Life Service?

A Yes, I am.

Q What is your present capacity and role with that agency?

A I work as the assistant or first accounting supervisor in the East Lansing Field Office, Division of Ecological Services, Region 3, United States Fish and Wild Life Service. I work primarily with Federal projects, that is, flood control projects, power plants, navigation projects and I also get involved in Section 10 and Section 404 permits as well as the NPD Permit Program.

Q Would you describe what the NPD Program is?

A NPD Permit Program is the National Pollutant Discharge Elimination System. It's the old Section 13 of the Rivers and Harbors Act of 1899 that was transferred to EPA by Public Law 92.500 in 1972 and has been subsequently taken over by the State of Michigan. It deals with the point source discharges of pollutants into the nation's navigable waters.

Q Do you have any role with regard to habitat preservation?

A Yes. That's the program in the Division of Ecological Services which basically revolves around habitat preservation. We get involved primarily through the Fish and Wild Life Coordinating Act. We are the coordinating agency with other [130] Federal and State agencies.

Q Did you view the parcel of land involved in this litigation with regards to that role?

A Basically, yes, through the Coordinating Act the Corps of Engineers asked us to take a look at it and I did view the site.

Q When did you view the site?

A I viewed it, I believe, January 11th, Tuesday of this week, with a helicopter trip and I was present at the site yesterday for field inspection.

Q Did you walk through the area yesterday?

A Yes, I did. I was with a group that walked through the area basically along the edge of the fill.

Q What, if anything, was your conclusion or determination of this area? What were the results of your walk, if anything?

A I concluded the area in question is a wetland. I would say that approximately 75 to 80 percent of the perimeter of the edge of that fill is situated on a cattail marsh. The remaining portion of it is on a shrub type of wetland, shrub swamp and a portion, in the northern corner, appears to be a wet meadow type of a wetland.

Q Would you be able to say that you can visibly see muskrat habitats from the very toe of the fill area?

A Yes. I counted several muskrat lodges near the toe of the fill. In fact, in one case there was some fill coming onto [131] the edge, appear to be coming onto the edge of a muskrat lodge.

Q Would it be your testimony that the fill activities were in effect covering up habitats of muskrats?

A Yes, I would say that would be the case.

Q Did you see any other impact on the wild life in the area?

A Well, most of the impact that I could tell was on the vegetation systems. The fill is covering up what is basically a wetland system and turning it into a terrestrial or upland system.

\* \* \* \*

#### CROSS EXAMINATION

BY MR. DANK:

[134] Q Do you agree with Mr. Allardyce when he says that in his opinion this marsh has been here 20 or 30 or 40 years?

A I would say basically, yes. There is only one additional thing that Mr. Allardyce didn't bring out.

The marsh, the wetland area up in this section here is what we term a deciduous swamp composed of red maple, dominated by red maple and a shrub underneath which is red osier dogwood. Both of them wetland plants. I would guess those trees, judging by the size of them, are probably in excess of 20 years old, I will say it that way, and probably older, much older.

THE COURT: So from that you are saying that you conclude that it has been a wetland that long.

A In this portion up in here near the Clinton River Road, the trees, you have a complete canopy of red maple and underneath the canopy the shrub layers are dominated by red osier dogwood.

Q (By Mr. Dank, continuing): Are you saying the cottonwoods have been there for 20 years or more?

A There is some cottonwood up in that area near those houses.

Q Dogwood, I'm sorry.

A The area I was talking about, I was speaking particularly about the red maple.

Q You are saying that red maple is a tree that only grows in a wetland?

[135] A I am saying when it grows, it generally and almost specifically is found in a wetland situation. When you find it growing in that situation with the other components with it is definitely a deciduous wood swamp.

Q It can live on the fringe of a wetland without being in the wetland, can't it?

A Pardon.

Q It can live on the fringe of the wetland without being in the wetland, can't it?

A There you get into the problems of where do you draw the line between the edge of the wetland and the edge, and the pick up of the upland, true upland site.

Q Where do you draw it, witness? Would you note the last red maple and draw the line there?

A No, I would draw the line somewhere where I would pick up a true upland community. I didn't see any at that site.

Q You did not see any at that point?

A I said I did not see the upland community at this site.

Q In other words, where the vegetation completely changes?

A True.

\* \* \* \*

#### EUGENE JAWORSKI,

was thereupon called as a witness herein, and having been first duly sworn, was examined and testified as follows:

\* \* \* \*

#### DIRECT EXAMINATION

BY MR. BEHRINGER:

Q Would you please state your name?

A My name is Eugene Jaworski.

Q Could you please indicate your present business or place of business and capacity at that place of business, if any?

A I am employed at Eastern Michigan University in the Department of Geography and Geology, it's a joint department, and I am an associate professor.

Q Do you have any, could you state the extent of your education?

A I received my Ph.D. from Louisiana State University which is renowned as an international coastal studies institute. They have done research all over the world sponsored by the O&R monies.

I spent one year at Texas A&M University in their Department of Geography where I did some [146] research on the erosion of the Great Lakes which has very extensive salt marshes behind here and here on the Great Lakes. I worked on the St. Clair Delta and maped that delta. We have done a dredging study protecting polluted dredge spoil lines. I am currently putting together a manuscript on the shifting of wetlands in the Saginaw Bay area. You are familiar with the article in the Michigan Academician concerning the marshlands of South-eastern Michigan.

Q I show you a document I have had marked as Exhibit 54, is that the article you were just referring to?

A Yes, it is.

\* \* \* \*

[158] (By Mr. Behringer, continuing): Now are there many wetlands in the Great Lake basin or specifically the Lake St. Clair basin?

A Yes. The Lake St. Clair Delta is a very extensive wetland.

Q With regard to the Clinton River Delta, are there many wetlands there?

A There were originally, yes, sir, but through development and erosion we've got just a small area south of the Clinton River left. It's that area west of Black River and south of the bend in the Clinton, that is the only area of intact wetland left in the lake, in this particular area.

Q Are you familiar with the United States Army Corps of Engineers wetland definition, fresh water wetland definition?

A Yes, sir.

Q Pointing to the area which is a red box and framed in two corners by Clinton River and the Black Creek on Exhibit 37, would it be your opinion that this is in fact a wetland?

A Yes, sir.

MR. DANK: Your Honor, you are talking about the legal definition or the Corps definition. I think that is within the province of the Court. That is the decision the Court has to make. I think this witness [159] can testify to facts but I don't think he can testify as to whether or not it fits into the description.

THE COURT: I will overrule your objection. I think if he is familiar with the Corps of Engineers definition he can testify whether it meets that definition. I think you can cross examine as to the basis of it.

A I would say that the area, because it was originally covered, at least sometime in the past and in some places today by aquatic vegetation, and I would include cottonwoods, certain dogwood species, the red ash and perhaps even more important a certain sedge, carax species in particular that grows right at water level and, and then going into deeper water, the cattails and bulrushes at this area, it has wet soils that are at least seasonally inundated and it supports aquatic vegetation. So under normal lake levels this is a wetland. This is a marsh.

\* \* \* \* \*

[160] Is carax spelled c-a-r-a-x?

A Yes, sir.

Q That is one of the items you just referred to as being a wetland type of vegetation?

A Yes. It's very likely that that species grew right in the area, right in the border between the shrubs and the deep water marshes.

Q Now can a wetland be put to agricultural use?

A They are. Under low lake level conditions the farmers will try to extend the limits of their cultivation under such conditions, yes, sir.

Q Can a wetland be recaptured when the agricultural use has ceased?

A Under some circumstances if agricultural means just pasture or moving of marsh grass for bedding or cattle feed then there isn't any problem, which is true in the St. Clair Delta area where they mowed certain areas or pastured cattle under low lake level conditions. If it's developed and the farmers have thrown up an earthen dike as in Monroe County and Tuccola County then, of course, the area is effectively sealed from the lake or river.

THE COURT: I think he wants to know, if you farm it, don't dike it and farm it in the years when the lake level is low, and the lake level comes back.

A Sure, the aquatics will grow in the open field, sure they [161] would.

Q (By Mr. Behringer, continuing): That occur even if drainage ditches were dug to an effect dry out the land during the low water period?

A If the drainage ditches do not have any effect on the water table and do not impose physical barriers, yes, the vegetation would move right into the flooded and inundated areas.

Q Do wetlands ebb and tide with the rise and fall of water tables and contiguous bodies of water?

A Yes, this is the thrust of the study that Professor Raphael and I are doing now.

Q Is it true that Lake St. Clair has a cycle eight to 20 years of highs and lows?

A Those fluctuations which may be described as cycles, they are not regular though, as you know, there is some variation in that cycle but it does indeed rise and fall over the years, yes, sir.

Q And would the rise and fall allow the wetlands to vary in degree in the nature of wetland characteristics?

A The changing of the water table, which is a major parameter or water level is associated with the shifting, lateral shifting of wetland lakeward or toward the river

during a low water period and inland during high water period.

\* \* \* \*

[164] [Q] So what I am interested in knowing is what data was used to change the 1873 map to allow you to end up with this representation in the area of 1973?

A In large part this is the basis for the 1873.

THE COURT: This, you mean that exhibit, Exhibit 53?

A Exhibit 53 [U.S. Geologic Survey Map: 1873] represents the basis for the 1873 map and photography, aerial photography, black and white, at a scale of one to 6000, extremely detailed, was used to create the map of 1973, plus some very general field observations. We did not work in the area specifically. We drove past it. We had no reason to work this area in any real detail.

\* \* \* \*

[171] THE COURT: As far as you are concerned, is there any significant difference between your diagram No. 2 and that '68 map?

A No. I think the boundaries of that '68 map, that is the landward boundary of the wetland conform very closely to this map.

THE COURT: There is really no significant difference?

A No. The little wooded area appears to be a filled area because it's irregular in shape and it looks like some brush or trees have grown up on there.

Q (By Mr. Dank, continuing): Referring now to page 306 [of PX 54], the bottom paragraph, I'm sorry, the second from the bottom paragraph that starts in the middle and says,

"An analysis of the coastal land use in 1973 during record high lake levels reveals that the only significant area of intact wetlands is within the inter-distributary basins of St. Clair River Delta and a small portion south of the Clinton River, Figure 2."

Is that a correct statement?

A Yes sir.

Q Referring to the map which you see immediately to your right, I believe that is Exhibit 37, can you tell whether or not the [172] shaded areas in here represent the lands that had been filled to your knowledge, in the Clinton River basin?

A The areas in orange?

Q Yes?

A Have they been filled by man?

Q Yes?

A Most of the areas that are occupied by finger lake developments and Metropolitan Beach area were formerly wetlands and have been filled, yes, sir.

Q You go on to say at this time the marsh of Lake St. Clair represents only some 5000 acres. Urban expansion in the Clinton River Delta and linear settlement along the lakefront is clearly evident.

Is that what you are referring to?

A As well as the encroachment from the west here as delimited by that red polygon.

Q What encroachment are you speaking of? You are saying there was some encroachment from that?

A You can certainly see it on both that map and you can see it on this map that the development is extending eastward and southward.

Q You are talking about residential homes?

A Yes sir.

Q Let me ask you now at this point, do you know whether or not this filling has had any affect on the other lands surrounding [173] the wetland?

A I would suppose that the filling promotes development, if you have areas that have been filled and developed, it increases the property values all along this lake because other areas may be developed also then.

Q Would the filling change the configuration of the existing land?

A It would do that and it would also deprive the fishes of Lake St. Clair of their food resources. We have a very unusual lake here in Lake St. Clair.

THE COURT: What you are really asking him is, as I understand it, does the filling along the lake increase the height of the water from the part where it's still swamp?

A I don't think it's very appreciable. That is not a problem. The problem is the destruction of the marsh and the wetland in terms of fish populations offshore as well as the esthetics.

Q (By Mr. Dank, continuing): You go on further in this paragraph and say on Harsens Island much of the lower portion of interdistributary marsh has been diked and planted with corn and other crops to attract migratory water fowl.

What effect did the diking have upon the land on Harsens Island?

A You take an area that is seasonally inundated and you dike it and pump water out in the spring, as they do, to lower [174] the water tables so they can plant their crops and allow them to grow during the growing season, you simply remove from the area of coastal wetland a certain portion of habitat.

As I mentioned earlier, Lake St. Clair is a very productive lake fisheries-wise next to Lake Erie and the fish feed in large part on the organic materials brought in from the marshes into the lake. There is a very high turnover rate of water, meaning the fish that live in the lake must get their food from somewhere and they get it from the wetlands. If you develop a wetland or you dike it, you effectively are removing this particular habitat from the food chain. That's one problem.

\* \* \* \*

January 17, 1977

[2]

RALPH KANDT,

having been first duly sworn, was examined and testified upon his oath as follows:

## DIRECT-EXAMINATION

BY MR. BEHRINGER:

Q Would you please state your name, for the record?

A Ralph W. Kandt.

Q And are you presently a member of the Lake St. Clair Advisory Committee?

A I am.

\* \* \* \*

[4] Q Have you physically been in the geographic area outlined on that map [Exhibit 37]?

A Yes.

Q Could you explain for what purposes, if any, you've been in that area?

A I've been familiar with the complete area on that map for most of my life, as far back as I can remember, which is—I—which I was probably seven years old in the area. I remember a good deal of things about the area.

THE COURT: Why were you there, what was the occasion?

A Yes, all the time.

THE COURT: For what purposes?

A Well, when I was old enough, I trapped in there, in the area, other than that, we went there, my father hunted off the lake, off the property in the whole area. I'm familiar with what the area looked like before Metropolitan Beach was there, before any lagoons were dug. I'm familiar with the whole area before Venetian Drive was on the edge of one marsh.

I've been in the area for 30 some years.

Q Are you familiar with the wetlands in that area, south of the Clinton River?

[5] A I am.

Q Could you approach Exhibit 37, and point out the wetlands area, approximately, to this Court?

(Witness approaching blackboard.)

A Everything in here.

THE COURT: I can't see you, unless—

A All of this white area, here. Into here, down—

THE COURT: Into where?

A The red area outlined in red.

THE COURT: Edge of that northerly portion?

A Down across here, and all the way over to Jefferson, all the way down to here.

Q How would you describe that area, plant-wise, to the best of your knowledge?

A It's a marsh. It was solid in this area that I'm speaking, here was solid, cattails, and then above that area, you had what we refer to as saw grass, it grows in a clump, and if you walk through there, it's hard knobs where the grass grows, and where it fades from this kind of thing into a regular field, field like grass.

Q Now, when was the first time, if any, that you may have physically been in that area? By that area, I mean the portion of the area within this red square on Exhibit 37 [6] you've described as a wetlands?

THE COURT: He described it as a marsh.

MR. BEHRINGER: As a marsh, I'm sorry, your Honor.

A About 15 years or so.

Q Could you approximate the year, specifically?

A 1960.

Q Have you been in those areas since 1960?

A I have not, in this. I have not. In this area here, I have not walked in there personally. I trap this area here, bordered by this canal. I had this whole section, the lease on this, for ten years, approximately. George Helzer had this. We saw each other back in here. Now, from right here, you're—the high bank goes back to the marsh. What I was trapping here, he had the very same thing over there, and from here you could see everything that was there, without walking in there.

Q On Exhibit 37, could you show the Court the area that you trapped?

A Yes, this whole white area, adjacent to this property, east. 298 acres.

THE COURT: You're indicating you trapped an area to the east of the canal that goes—shown as a canal there, going up to the north and from [7] there over to the canal or stream on the next—to the subdivision, and from Clinton River, showed down to the top of the orange area?

A Right.

THE COURT: Then you're indicating you didn't trap to the west of that, but you could see from along that canal the area that was being trapped to the east

A Yes, your Honor.

Q What if anything—

THE COURT: Let me get the years. What years did you trap in there, or have that lease, approximately?

A I would say, from around '62 or '65, until last year.

THE COURT: Thank you.

Q What if anything did you trap in that area?

A We trapped muskrat in there, some coon, what was in there, we have fox in there, we have raccoon in there, possum in there, muskrat in there, any of the species, animals in the general area we have in there.

Q How many muskrat might you have trapped there, annually?

A It varied each year, according to the weather conditions, and the availability of food and so forth that—it could vary anywhere from 500 to over 2,000.

\* \* \* \*

[9] Q Have you ever seen any crop, like corn, or sugar, beets, or potatoes growing in there?

A No.

Q Now, in addition to trapping that specific rectangle on Exhibit 37—

THE COURT: Excuse me for a minute. Do we have one of those overlays?

MR. BEHRINGER: Yes, we do, your Honor. Let's use one here, and then I'll have him draw where he

trapped and where he's drawing the lines.

THE COURT: There's a grease pencil, here. You'll have to tape it to the blackboard, but—I think you can tape it carefully.

Will you put your initials on the bottom, sir, and then show us the area that you—first of all, outline the area that you trapped.

Would you put your initials on that, somewhere?

Now, will you outline the area that you showed me, before by hand, where you say the marsh extended to the west of where you were, draw it to the best of your ability.

\* \* \* \*

#### CROSS-EXAMINATION

BY MR. DANK:

[14] Q When you draw the line across the red square, here, were you drawing the high water line or low water line?

A I was drawing what would—you could determine as an in between line, in regards to the periods in which you mentioned.

Q In other words, you're telling us, now, that the northern most line on this area traversing the red section is a middle ground of some kind?

A Yes.

Q I see. Tell me this—

THE COURT: I don't think he finished.

A —in drawing the line, I was drawing the line that was over the years that was predominantly wet. As the water goes up in a very high period of time, you would have water animals across that line. But they would not be there all the time.

Q Um-hmm.

A But the line that I drew, there was always cattails there.

Q Okay. Now, I've noticed that you indicated some part of this red area, sticking up and going up the—

against—South [15] River Road is not in the marsh—road that you observed, is that a fair statement?

A Yes.

Q And the lines intersects this little finger that reaches up and touches South River Road, just about the middle of the line where it turns the road, and at its southern most point, is that a fair statement?

A Yes.

Q Now, how many times did you tell us that you've actually walked the property in question?

A I've only physically walked the property a few times.

THE COURT: Where, when—are you excluding when you are trapping it, or—

A Well, he mentioned the property in question. I understand that to be the area within the red diagram.

Q Yes.

THE COURT: Okay.

A Yes, I have only been through that property physically a few times.

Q When is the last time you were on that property?

A Three years ago.

Q Okay. And the time before that, do you recall when you were on it, then?

A It would have been sporadic. If I was in there, maybe it wasn't every year, maybe every other year, and it was only [16] for maybe one time, going through there.

Q Just walking?

A Sometimes I came in when the weather was bad, and we had our first ice, we could not get back in with the boat the way we usually did, and sometimes we parked on Jefferson and we walked through there to gain access, to get back into where I was trapping.

Q You mean you walked across this property?

A Across this property to get back in there, where I was trapping.

Q So the only time that you've been on it, would have been times that you walked across it, is that correct?

A That's right.

Q The last time would have been about three years ago?

A Yes.

Q Could it have been two years ago?

A No.

Q Could it have been four years ago?

A It could have been four years ago. It was not within the last two years.

Q Mr. Helzer you say worked and trapped the land adjacent to the farm you leased?

A Yes.

\* \* \* \*

[29] DONALD H. RIELLY,

having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT-EXAMINATION  
BY MR. BEHRINGER:

Q Sir, would you please state your name, for the record?

A Donald H. Rielly.

Q Mr. Rielly, are you familiar with the area outlined on Exhibit 37, which is posted on the blackboard to your immediate right?

A I am.

Q You may want to come forward and take a look at it.

A I am, sir.

Q Now, have you ever had occasion to trap muskrat in any portion of the area outlined on Exhibit 37?

A I have.

Q Would you please come forward and take this red pen and for the purposes of showing this Court and the defendants, outline the area that you have trapped in.

\* \* \* \*

[31] Now, Mr. Rielly, you indicated an area here that is south of the bend in the Clinton River, and it moves westward toward the Jefferson Avenue, have you trapped exclusively within those two lines that you have drawn?

A I have, all the way over to Jefferson.

Q Have you trapped on—

A Pardon—

Q I'm sorry, complete your answer.

A To Jefferson, Yes.

Q Have you trapped on either side of those two lines?

A I might have sporadically, but this is my general area, in here.

Q Could you indicate to the Court, the period of time you began to trap that area?

A Approximately 1937 to about 1960.

Q Did you trap—

A I'm not a trapper by trade, I'm just a trapper that puts out 50 to a hundred traps. In other words, I wouldn't be going in here like a professional, this is a kind of a spare time—you know, not only did I trap, but I hunted, also, ducks, when the high water level, by walking in most of the time with boots. I—

Q Have you ever had to wear your boots—strike that question.

[32] Have you ever seen the area within your trapping indication, used for agricultural purposes?

A No, never.

Q You've never seen a furrow laid through that area?

A No, sir. I never seen any equipment or anybody back there.

Q Have you ever seen any crops, such as corn, or sweet potatoes?

A No crops of any description.

Q Now, looking east or with regards to the portion of the area east of your most eastward line, have you ever seen any portion of that lake land used for agricultural purposes?

A No, sir.

Q Now, with regards to the lines that you've—it's actually the westerly lines of the two lines you've drawn, could you describe the nature of the land between the westerly line and Jefferson Avenue, to the best of your personal knowledge?

THE COURT: Show him what you're referring to, now.

A You're talking about in here, sir?

THE COURT: Not the land you trapped, but the land north, and east where you trapped.

Q North and west.

THE COURT: North and west, I misspoke myself. Thank you.

[33] Q Do you know that area to be an area which is presently being filled?

A I do.

Q Could you describe the area to the best of your personal knowledge, before it was being filled?

A Well, I'd say it—roughly, about 70 per cent had to be in cattails in there.

\* \* \* \*

[46] GERALD F. MARTZ,

having been first duly sworn, was examined and testified upon his oath as follows:

#### DIRECT-EXAMINATION

BY MR. BEHRINGER:

Q Please state your name, for the record?

A Gerald F. Martz.

Q Mr. Martz, where are you presently employed?

A I'm employed by the Wildlife Division of the Department of Natural Resources, in Lansing.

THE COURT: That's your part of the State of Michigan?

A State of Michigan, yes ma'am.

THE COURT: I assumed that.

[47] Now, are you familiar with the area of land involved in this litigation?

A Yes, I am.

Q Have you physically been on the site?

A Yes, sir.

Q Could you specify the days that you were on the site, if any?

A We flew over the area in the helicopter on the eleventh of this month, and we physically walked the area on the fourteenth.

Q Now, have you come to a definition of what you as a biologist would call this land?

A Yes, sir.

Q What would that definition be?

A It's a wetlands.

Q What is the function of a wetlands in—

A Wetlands have many functions. They are producers of wildlife, and they all are the producers of the fish population. They also control and help the regulation, nutrients entering the state surface waters, trap sediments, and a variety of other uses. A wetlands are very dynamic in nature. They're constantly changing. They're not a stable thing. This is primarily in response to water conditions, which are both changing, perhaps daily, certainly seasonally, and even on a year-to-year basis. [48] Particularly here on the Great Lakes, they respond to long term fluctuations in water levels, and water conditions, and in fact, the inland wetlands away from the coast also are dynamic in change.

Q Would you find different zones or vegetation in a wetlands area?

A Yes, we did. Those zones in my opinion are—could in all be typed as various classes of wetlands, and they range from meadows to deep marshes, to open water.

Q Now, will certain plants and—characterize the zones of vegetation with regard to the transition between lake and upland?

A Yes, they do. The meadows in particular were characterized by the presence of sedges and blue joint grass. The sedges being carrots, in this particular case. And I think you have to understand, that of course the deeper marshes, cattails appear to be the dominant or deeper portions of the marsh, and these are all wetlands categories.

Q Would you—

A The wetlands themselves, then are a transitional area between the open waters of the lake and the uplands itself and as such, the—they literally fill all the area between the extremes of lake level fluctuations here, on the Great Lakes.

\* \* \* \*

[57] ROSS E. POWERS

having been first duly sworn, was examined and testified upon his oath as follows:

#### DIRECT-EXAMINATION

[57] BY MR. BEHRINGER:

Q Would you please state your name?

A Ross Powers.

Q And what type of Government are [you] employed with, the Federal or the State?

A I work with the United States Environmental Protection Agency, Region 5, Michigan Department Office, located in Grosse Ille, Michigan.

Q Are you familiar with the area involved in this litigation?

A Yes, I am.

Q Have you been physically on the site?

A Yes, I have.

Q Could you state the dates, if any, you were physically on the site?

A January 11, we did a perimeter survey, by car. Also, we overflowed the site by helicopter, and again last Thursday, we visited the site.

Q Now, you visited on Thursday, did you walk on about or adjacent to the fill on the property involved?

A Yes, I was with Hal Harrington and we walked at the foot of the fill. I've got a sketch of the—where we did walk and we also collected samples of predominant vegetation as we walked through that area, and I personally collected two points source samples.

THE COURT: Two what?

[59] A Two specific samples of a specific location, rather than a general transect, and I brought them up here on the stand. It's items 50 and 51.

Q Did you take those samples back to the DNRA offices and study them, after you conducted your on-site investigation?

A Yes, we did.

Q Now, perhaps before I go in that direction, could you indicate with some—

A I can describe—

Q —could you tell us where you obtained the samples?

THE COURT: You said you drew a little map, yourself, right

A Yes.

MR. BEHRINGER: Let's mark it, maybe we can make some copies.

A I directed the samples at these two locations, because they had easily identifiable landmarks. First location was directed underneath telephone poles that run parallel to South River Road. And there's one pole that stands about ten feet away from the present edges of the field. And I collected samples of the emerging vegetation in that area and I also spudded a hole through the ice in that area and collected a sample of ice and the frozen dirt underneath the ice.

Q Could you tell us how deep the ice was, at that spot?

[60] A Yes, the ice at this spot was half inch thick and thin I spudded it, broke at the interface of the ice,

and the frozen soil. And I chopped about three inches into the frozen soil with the spud, and extracted a sample of that.

Q Do you recall which bag, which exhibit contains the samples you obtained at the site?

A At the telephone pole was Exhibit 51.

Q Did you conduct any studies on Exhibit 51?

A Yes, sir, we looked at the ice out in the field and recognized that there was some green collard plants called duckweed. We took these back to the labs, and looked at them under the microscopes, and they were—the primary material that was there was Lemnatisulca, that's a specific kind of duckweed. It forms a kind of net, but it grows just underneath of the water in quiescent areas.

Q Did you find any other types of duckweed?

A Yes, sir, associated with that same sample, we found some floating duckweed, some Lemnaminor, found some snail shells and one was the pond snail, called physa, and we also found sedges, blue joint grass, and an ash sampling. In addition, we found in the washings from the soil various pennatae diatoms, meaning elongated instead of rounded, and we found crustacean called a scud, it's an anthropod (sic).

THE COURT: Scud is just like it sounds, s-c-u-d?

[61] A Right.

Q What if anything can you tell us about these findings; are they indigenous to wetlands?

A The significance of course is that there was a total absence of upland variety.

Q Does either Lemnatisulca or Lemnaminor have any role in the ecological system?

A Oh, most definitely, yeah, the—these duckweeds are fed on by ducks, and they also provide habitat for microorganisms; plankton and so on. They're important as fish food for the fry that are spawned in this type of area in the spring.

Q Did you hear Dr. Jaworski's testimony on Saturday?

A Yes, I did.

Q Would this role of various Lemnas, would this role of the various Lemnas you have described as being called plankton, be in fact the function that Dr. Jaworski was testifying about, as regards to this marsh furnishing of food supplies for the fish population of Lake St. Clair?

A Yes, I think that is what he was getting at. This is part of the ecology of Lake St. Clair.

Q Similarly, did you just hear Mr. Martz testify that various products of the marsh are in fact the ultimate food source for fish, in Lake St. Clair?

A Yes, they contribute to the food source of Lake St. Clair.

\* \* \* \*

[65] Q Now, at your first location, the telephone site, isn't it correct, there's also a fire hydrant to the west of that telephone pole, right along South River Road?

A I didn't observe one, no. So, I don't know.

Q You state you only had to spud through half inch of ice, rather than two inches of ice at the telephone pole site?

A There was a half inch at the telephone pole site; two inches at the "do not anchor site".

Q Now, did you take Exhibits 52, the contents of Exhibit 52, that sample at the no anchor site?

A No, it was Number 50.

Q Number 50, I'm sorry.

A I took Number 50 at the "do not anchor site".

Q 51 at the telephone pole?

A Right.

Q What analysis, if any, did you do of the sample in Exhibit 50?

A I did the same type of analysis. We looked at it under the microscope, there were diatoms again, the same three types. The—I didn't find very many of the Lemnaminor duckweed at this point. I don't know why. The Lemnatisuica was very abundant. And of course, there was burweed, one of the emergent plants there.

Q Did you find any upland plants?

A No, this particular site didn't have any upland plants at [66] all. It was right where the almost continuous cattail marsh started and proceeded to the south.

Q You heard the testimony of Mr. Harrington, Mr. Allerdyce, Mr. Lang, Mr. Jaworski, and Mr. Martz. Would you have anything to add to that testimony which would not be cumulative of something we already have heard?

A No. I think that's about all I can add to their testimony.

THE COURT: How deep did you get your sample? How much soil?

A How much earth?

THE COURT: Yes.

A I directed about three inches down on each site with the spud. I did notice that someone else had spudded a hole in near the "Do not anchor sign" and had removed about six inches of material. I assumed a couple inches of ice and four or more, and that water had flowed back into that hole. And the water was, from the top of the ice down to the bottom, I just estimated, about six inches down.

The significance here, I think, is, that in both locations, the soil was frozen solid and could be chopped out, and unfortunately my evidence melted. But I did bring the ice and the frozen soil in.

Q Would you have to go any deeper to satisfy yourself soilwise that this was in fact a wetlands?

[67] A No, sir, because as far as I could tell, it was saturated enough to freeze. There was water just six inches down and I assume that from vegetation and whatever, that this is—would be in the summer time free water, surface water.

MR. BEHRINGER: No further questions.

THE COURT: Thank you.

## CROSS-EXAMINATION

BY MR. DANK:

[69] Now, you say that you saw a fire hydrant?

A Yes, sir.

Q Was it out in the fill?

A In the marsh, yes.

Q Were there streets around the fire hydrant?

A No, sir.

Q Sidewalks around it?

A No.

Q How about the manhole that you saw, were there any streets around that, or sidewalks around that?

A No, sir.

Q They were out into the field, too, then, is that correct?

A That's correct.

Q How many fire hydrants did you see, altogether?

A One.

[74] DR. ELWIN EVANS

having been first duly sworn, was examined and testified upon his oath as follows:

THE COURT: Would you be seated there, please.

Do you have a middle initial that you use, or don't you use one?

THE WITNESS: I usually don't use it.

THE COURT: All right.

MR. BEHRINGER: Your Honor, Dr. Evans' resume—

THE COURT: I have it, here.

MR. BEHRINGER: Thank you.

## DIRECT-EXAMINATION

BY MR. BEHRINGER:

Q Dr. Evans, would you please state your present place of employment?

A I work for the state, in the Department of Natural Resources and the Environmental Protection Branch Bureau.

Q Do you have a specific duty with the Environmental Protection Bureau?

A Since coming to the Bureau in 1972, I've been performing studies in the lakes and streams to determine the impact [75] of man's activities on the aquatic system.

Q You do not work in the same division as does Dr. Gerald Martz?

A That's true.

Q So specifically—well, he works in wildlife, you work in the water quality division, is that correct?

A Yes.

Q Are you familiar with the land involved in this litigation?

A Yes, I walked the area at the face of the fill. And the first time I saw the area was January 11, at which time I flew over it in a helicopter.

Q Have you come to a definition as to the character of the parcel of land involved in this litigation?

A I have.

Q Could you state that definition?

A Wetlands of high quality.

THE COURT: Wetlands of what?

A High quality, desirable type wetlands.

Q Could you elaborate what you mean by—

A Of all the classifications that previous witnesses have given, this falls in get a very high degree of productivity of fish and other type animals. This is a sh. marsh, the type—

## CROSS-EXAMINATION

BY MR. DANK:

[78] Q Mr. Evans, let me ask you this question. How do you feel [79] generally about filling operations?

A Well, I think if you meet the requirements set out in law and its judged that in fact this has some redeeming value to fill, to do something worthwhile for the public, and the trade off between the resources you therefore displace, and the benefits accrued by the public; I'm not going to jump up and down and scream. I say these are the things you are replacing, how are we going to mitigate this particular displacement of the public resources. That's all.

Q By and large, you are opposed to filling operations, are you not?

A If I was going to make a judgment under the Public Act 17, which says we shall conserve and protect the resources of the state, I would have to make conservative judgment, until it is actually demonstrated that in fact no damage is going to occur. For if the damages do occur, that they will benefit the public greater, will be accrued.

\* \* \* \*

GEORGE SHORT,

[84] having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT-EXAMINATION

BY MR. DANK:

\* \* \* \*

[85] Q Now, what if any position do you hold with reference to the Riverside Bayview Homes, Inc.?

A I am president of the Corporation.

Q And for what period of time have you been president of the Corporation?

A Since the Corporation was organized in 1960.

Q I see. And what if anything is the business of Riverside Bayview Homes, Inc.?

A I didn't—

Q What is the business?

A It was formed specifically for this particular subdivision. Developing this area, this particular subdivision.

Q Is Riverside Bayview Homes Inc. a closely held Corporation? By that I mean, does it have a few stockholders?

A Five incorporated.

Q Tell the Court who the shareholders are?

A Well, I have 300 shares; and then very close friend of mine and my original partner by the name of Dr. Leaver owns 400 shares; and my ex-wife owns 100 shares, and Mr. Biederman and Mr. Melvedt owns 150 shares each.

MR. BEHRINGER: What is that last name?

MR. DANK: Melvedt, M-e-l-v-e-d-t.

[86] Q (By Mr. Dank, continuing): What if any connection does this Corporation have to the property which is the subject matter of this litigation?

A This is its entire asset.

THE COURT: Can you clarify something? The property you are referring to is just the property that is outlined in red on the map?

A Yes.

THE COURT: It's that shape?

A That's Riverside Bayview subdivision, and we call it, the Corporation, Riverside Bayview Homes Incorporated.

Q How did the Corporation acquire the property?

A Well, it acquired it—a—originally, my—I had a partner, and we were called Distin & Short. And we started acquiring this property in 1952.

THE COURT: Excuse me a second.

(Pause in proceedings.)

A We started acquiring this property in 1952. And I was responsible, basically, for acquiring the property. We bought it and settled the different lots from the 46 different people. That was quite an undertaking within itself. And the doctor, through my doctor influenced the

doctor to put his money into it. And then, in 1960, we incorporated and brought other partners in.

Q Well let me see if I can go back over your testimony a [87] little bit. Some part of this parcel then, you acquired in individual lots, is that correct?

A It was all acquired from—practically from individual lots or groups of lots.

Q Is it not true that some part of this property is acreage and has not been platted?

A The 20 acres to the east of Macomber, as you see it there, in red, that is the 20 acres that separate from the subdivision.

Q I'm going to show you what has been previously admitted as Defendant's Exhibit Number 39, and I'll ask you if you can identify that, as the plot of property from which certain lots have been acquired?

A That is the subdivision of land.

Q Now, how did the property get from Distin & Short to Riverside Bayview Homes, Inc.?

A A—the new partners felt it would give us a little protection to incorporate it. And my partner bought me out of Distin & Short in 1957. And he was a little run short of investment, so I followed through and found buyers to acquire his stock, because he felt that he didn't have time to spend with this, and it had always been my dream, to develop this property. So I had continued on then to be president.

Q Was Mr. Distin part of the original incorporators of [88] Riverside Homes?

A Yes, he was.

Q And other people subsequently acquired his stock, is that correct?

A That's correct.

Q And that accounts for other shareholders that you now have in the Corporation?

A That's correct.

Q Would it be a fair statement to say that Distin & Short transferred the titles to the property to this Corporation?

A That's right.

Q Now, does this Corporation have any ongoing business, which produces income or profits or income which to pay expenses?

A No.

Q I'm sorry?

A All the money, the expenses of this Corporation, we have to assess the stockholders, for the actions and any expenses involved.

Q Now, you've testified that you began acquiring this property, in what year?

A Approximately 1952.

Q All right. Have you been familiar with the property since that time?

A I sure have.

[89] Q Have you made efforts to develop this property?

A We've been trying to develop it ever since the day we started. We had progressed to different ideas; and the most important thing to me was to develop the land to the highest and profitable use, and to serve the community and the people of that community.

Q Now, what if any—let me just ask you this, if you have been trying since 1952 to develop it, why haven't you developed it?

A We had different setbacks, and we went along.

Q Can you tell us what the setbacks were?

A That's going to be a very long story.

Q Make it as brief as you can.

A Well, for instance, Jacks Street, we asked to have that vacated.

THE COURT: What street?

A Jacks Street, because we had planned on bringing a canal. We had right-of-way over two, ten acre pieces, next to it, and we had planned on coming in from Black River with a canal. And when we went to ask for Jacks Street to be vacated, person by the name of Mr. Bittner owned 22 acres behind us, and he objected to us vacating

it, due to the fact that we would land lock him, and we've offered to put—give him the right-of-way through the 20 acres. But in the Court proceedings, they decided to not vacate [90] Jacks Street, and then I heard, oh, about—

Q Don't get into what other people have said to you.

Let me ask you this, does this property, so far as you know, does it require sewer and water, in order to develop residential lots?

A Yes, it does.

Q Has the sewer and water facilities been available to this property, in order to develop it?

A They weren't available, until—what year was it, Fred?—1959.

Q For purposes of the record, I'm going to ask you to testify to things you have memory of.

A I couldn't give you an actual year, but that was what was holding us up, was the sewers. And the sewers are now available.

Q Does the township of Harrison require that elevation of the lots be raised, in order to develop this property?

A Yes, they do.

Q Have you been able to get the necessary fill material to raise the elevation?

A Yes.

Q When was the material first made available to you?

A The latter part of this year, or of last year. I believe it was December, early part of December or latter part of November.

[91] Q Had you tried in years past to acquire fill material for the lots?

A Been trying for the last ten years. I've been patiently been waiting for the dirt to be available.

Q Let me ask you this, since sewer and water has become available, has any part of this subject property been improved with the installation of sewer and water lines?

A Yes, there has been several new houses built in the immediate area, in the last two years.

THE COURT: I think he's asking you, in your particular subdivision, the part you own.

A Yes, the entire Macomber Street.

Q How about sidewalks?

A Sidewalks were down on Macomber Street, as far back as 19—when the subdivision was originally subdivided.

THE COURT: When was that, by the way?

A Well, accordng to this plat, if I can see right—

THE COURT: I can see it.

A Whenever the plat was put on record.

THE COURT: Right. Do you have that date, Mr. Dank?

MR. DANK: 1916, February 10.

THE COURT: 1916?

MR. DANK: 1916.

[92] THE COURT: All right. Do I take it, the water was there before the sewers?

A Yes, the water was put in about the same time as the sewers, because we had to dedicate an easement at the end of our property for the sewers, and the water to be put in, because Helzer was vacated. Helzer has been vacated and we dedicated the lot across the end of our subdivision for the water line and the sewers.

THE COURT: But had there been water lines or water in there a long time ago?

A There was water, but they were smaller lines on Macomber, and the rest of the subdivision at the end.

Q Were the water and sewer lines, both put in with special assessment proceedings through counsel?

A This I couldn't answer. My associates took care of that mostly.

Q All right. Now, are you familiar with the construction of the Foresight Dike on this particular property?

A Yes, I am.

Q Did you have any contact with anyone, either from the Corps of Engineers or the Township, concerning the construction of this dike?

A I had no connection with the Corps of Engineers. I was approached by the Township official, and—

Q Would his name be Glascock?

[93] A Yes, Mr. Glascock.

THE COURT: Glascock?

MR. DANK: Yes.

A And he wanted permission to put the dike across our property, and of course, I objected very strenuously. And I told him, I'd be happy to allow him to put the dike around our property. And he said to me, well, George, he said, you'll have to pay for the bulldozing if that's what you want. I says, that's all right. I'll pay for the bulldozing. What would this amount to. And he told me, estimated about \$5,000. So I agreed to the bulldozing.

Q Now, is this one of the expenses that you've already testified that would have required an assessment of the shareholders?

A That's right.

Q Did you discuss, and were they willing to pay it?

A Not at that particular time. I felt it was so essential, I planned on putting the money up myself, and if the association refused, I mean, the Corporation refused to pay for it, I would have paid for it out of my own pocket.

Q But the members of the Corporation did what?

A Well, what happened, one of the members come back from Florida and it was conveyed to him that the people at the end of this where these houses was, it was so essential to them, that we agreed to allow the dike to be put across [94] the end of our property, which would be a lot shorter, and so they held a meeting, and they all voted against me that this was essential, that they protect these people. So I went along with the Corporation and agreed to let them put the dike across there.

Q Was the dike construction then, at the expense of the Corps of Engineers, as opposed to the expense of the Corporation?

A Expense of Corps of Engineers.

Q Now, in your communications with Mr. Glascock, were you ever led to believe that there was any prohibition against putting the dike around the perimeter of your property, if you were willing to pay?

A There was nothing more discussed. Once my associates insisted on it, I assumed there might be some negotiation between—

Q I don't think you heard my question, Mr. Short. Was there ever anything said to you by Mr. Glascock, indicating that if you wanted to pay for it, that you could not have the dike around your perimeter?

A No, no.

Q Mr. Short, in the years that you have assembled and owned the lots and property in question, have you been familiar with its physical characteristics?

A I didn't understand your question.

[95] Q Have you been familiar with the physical characteristics, have you been on the land, seen the land?

A Oh, yes, continuously.

Q Can you tell us what you know about the land, so far as it being wet or under water?

A Well, occasionally, there's a little water in some of the low spots, wherever land—wherever there are some low spots. But when I go back in 19, either 54, or 55, while I was still Distin & Short, I had the property mowed with the tractor, and a mower, and we mowed the whole entire area at that time, and then we burnt it all, and we had to get a permit from the Fire Department to burn it, and it was hot lather at that time.

Q Have there been periods of time when the land has been wet?

A Yes, there's been periods when it was.

Q Can you recall specifically what times?

A Well, it's hard for me, I don't have the details completely.

Q Mr. Short, have you had any conversation with the Township officials, regarding the question of whether or not you were obliged to fill this property?

A We received at letter from them instructing them about three or four months ago. The Township passed an ordinance requiring us to fill out lots or fine us \$500, and I think—maybe I have one of those letters, here.

\* \* \* \* \*

[113] FRED R. BIEDERMAN,  
having been first duly sworn, was examined and testified upon his oath as follows:

\* \* \* \* \*

[114] DIRECT EXAMINATION  
\* \* \* \* \*

BY MR. DANK:

Q Are you connected with Riverside Bayview Homes, Inc.?

A Yes, I am the secretary.

Q For what period of time have you been a secretary?

A I would say about 1965.

Q Have you held any other office in the Corporation?

A As I recall, I was treasurer for a short time.

Q Okay. You are also a shareholder, is that correct?

A I am, sir.

\* \* \* \* \*

[123] Q (By Mr. Dank, continuing): Witness, have you had any conversations with anyone from the Township concerning a permit, from the Township to fill this property?

A Oh, yes.

Q And can you tell me what the result of those discussions have been?

A We had a permit issued to us, for fill.

\* \* \* \* \*

### CROSS EXAMINATION

BY MR. BEHRINGER:

\* \* \* \* \*

[131] THE COURT: Have you had any assessment on the real estate property tax assessment?

A It's never been brought up at a meeting that we object to it.

Q Did you testify that these assessments have been increasing?

A Did I testify to that?

Q Yes, sir.

A I have a report on that, yes.

Q Have they increased over several years?

A The assessments?

Q Yes, have any of the assessments of any local authorities increased over the last couple of years?

A Yes.

Q Dramatically?

A Dramatically.

Q Have there been a substantial increase?

A Well, from 187,380 to 200—from 1975 to '76.

THE COURT: Is that for taxes or evaluations—in other words, they increased from 187,380 to 232,777? Increase of \$45,397.

Q Was there any effort made to contest that increase with the [132] local tax authorities?

A No, they're not due, yet.

\* \* \* \* \*

[137] Q Thank you. Now, what did you mean by original subdivision status?

A Original—well, the time I became involved in this property, I would say that it was high enough that we could have gone ahead and built on it.

Q That's your—excuse me—

A Pardon?

THE COURT: Excuse me.

(Pause in proceedings.)

THE COURT: Go ahead.

A Excavation from the basement would have brought us up where we probably wouldn't—requirement. Another plan incorporated lagoon in there, which gave us all the fill dirt we're required from the development of this site.

Q What original subdivision status were you talking about, if any?

A Well, the time that I became interested in it, it certainly [138]—whether it would be construed or wetlands, I doubt very much. I had never had that interpretation of it.

THE COURT: Had it been a subdivision, before?

A Oh, yes.

Q What do you base that response on, what knowledge do you offer to support your statement, that this had been a subdivision?

A Well, in the first place, I put an extreme value on property adjacent to water—

THE COURT: What causes you to say that it had once been a subdivision?

A It always was—

THE COURT: I—

A —because of recorded plat.

THE COURT: Was—

Q Was that the only basis you had?

A For construing it as—

Q —an original subdivision, or as having been originally subdivided?

A Yes, I would say that.

THE COURT: Were there streets and sidewalks in there?

A Yes, there were at the—I would say, the north end of it, and there was water in there, too—water, hydrants.

[139] Q Now, you stated that the Corps told you to put in the statement part of wetlands of Lake St. Clair?

A Right.

Q Is that correct?

A That's correct.

Q At this time, I show you stipulated Exhibit Number 4, do you recognize that at all?

A Yes, I do.

Q Is that in fact a reduction of a larger map that you gave to the United States Corps of Engineers in October of 1976?

A Yes, I believe it is.

Q Would you please turn to Exhibit 33 on your right, is this a similar side, original or copy of the document you gave to the Corps in October of 1976?

A It appears to be.

Q Now, with reference to either Exhibit 4 or Exhibit 33, do you recognize this statement here, and I'm pointing to—if the map corner is up—the upper left hand corner of Exhibit 33, is that your printing?

A Yes.

Q What does that say?

A No fill will be placed below the high water mark elevation 575.7; IGLD, in this area, and signed by myself, dated 10-22-76, and you know who put those words in my mouth?

Q Please tell the Court who put those words in your mouth?

[140] A Corps of Engineers.

Q By saying, put those words in your mouth, do you mean to tell the Court that as—between the Corporation —between the United States Corps of Engineers, there was a dispute as to portions of that triangle?

A A dispute?

Q Yes, sir.

A I don't know about a dispute; I don't think it ever been settled just what area we would—could not fill in, and this was taken down to them to determine whether they had jurisdiction over certain area and to magnify that, this—I was told to put on there and sign, which I

did. I acknowledge that I put that on there and signed it, not with any respect to being an engineer, because I'm not an engineer, but I put that on there as the suggestion of one of the Engineer's men.

Q Would it be fair—what would be fair to say, then, was there a difference of opinion as to what could or could not be filled?

A I think there's always been a difference of opinion, but I'm not a qualified engineer to know.

Q What was the difference of opinion, as you understood it, on October 22nd 1976?

A I think there was a question of whether jurisdiction went in that direction.

[141] Q Did the Corporation assert at all or portion of that triangular portion was in fact an uplands, which was without—of which the Corps was without jurisdiction?

A Mr. Melvedt and I walked over this area, and we took dimensions and put them on plan that we had, similar to the outline of our property and then compiled it into figures that this was eventually drawn from. And we —when we walked over this area, we assumed that that could not be construed as what was determined wetlands, because we were walking on it, and we repeatedly said, we don't know how it can, and it was accepted with this definition in there, in 575.7 IGLD. Was just a figure to me. I didn't know.

\* \* \* \*

January 21, 1977

[2] HARRY HELZER,

having been first duly sworn, was examined and testified upon his oath as follows:

THE COURT: Will you be seated there, please.

### DIRECT-EXAMINATION

BY MR. DANK:

Q Mr. Helzer, how are you employed?

A Employed?

[3] Q Yes.

A I'm not. I'm retired.

Q How old are you?

A Seventy-five.

Q What did you do before you retired?

A I worked for the Metropolitan Beach.

Q For how long?

A Just before I retired, about eighteen and a half years.

Q What did you do before that?

A Farming.

Q Where did you farm?

A On Prentis.

Q Okay. Can you tell us what township that was in?

A Township?

Q Yes.

A Harrison.

Q That's in Macomb County, Michigan?

A Right.

Q You say you had a farm on Prentis Street?

A Yes.

Q Where is Prentis Street?

A That's about—between Jefferson and Prentis.

THE COURT: Off of Jefferson, in other words?

A Beg pardon?

[4] THE COURT: Prentis is off of Jefferson?

A Yes.

Q Is Prentis west of Jefferson?

A Um-humm, yes.

Q Is it north of the Beach Highway?

A North—yeah, it would be.

Q Okay. Are you acquainted with—let me ask you this, how long did you farm in that area?

A Well, I was about ten years old when we bought the farm. And we sold it about six, seven years ago; so we farmed it quite a while.

Q Did you begin farming there when you were ten years old?

A Oh, yeah, that's when we bought it.

Q Did you live on the farm?

A Yes.

Q How long did you live there?

A 'Till I was about 28.

Q Did you continue to farm after you—not

A —my dad did—I mean, but I worked in Detroit.

Q I see. Did you farm any other property, other than the property your farm owned?

A Yes.

Q Where?

A We farmed the property on the Metropolitan Beach.

[5] Q Property where the beach now is located?

A Right.

Q All right. Did you farm any other lands? Did you farm any other lands besides that?

A A—well, my dad farmed and then we farmed that, too, see.

Q I see. Are you familiar with the property that is the subject matter of this law suit?

A I am.

Q And can you tell us what your familiarity with it is?

A Well, well, when I was about ten years old, this property, I think that you're talking about, is, was—was farm land. They was—well, let me see, there was one, two, three, there was four farms right—this property.

Q Now, when you say this property, are you speaking of the property that is the subject matter of this law suit?

A Right, right, that's the property that we are talking about, on the north side of Jefferson, right.

Q North or east?

A Yeah, I—there was a big farm right on the—this property. The house was on one side of Jefferson and the building were on the other side, and Jefferson was just a dirt road, then.

Q You know who were the farmers that operated the farm at that time?

A There was the Sharezak (ph. sp.)—

[6] THE COURT: Do you know how to spell that?

A No, I don't, ma'am. They were living there, then. And then there was—Sharezaks, and then there was Hubbard (ph. sp.), had a farm there, too, right there, and then were was—and then—and then—that's the Verschave (ph. sp.) property, now. That was a big farm. Those people had, well, even the Sharezaks, they had a lot of cattle. They done a lot of farming there.

Q Have you ever seen crops growing on this piece of property?

A Yes, I did.

Q What sort of—

A I saw beautiful corn along that piece of property, right along, down to the drain, now, the south end of it.

Q Savan Drain?

A Yes.

Q You saw corn there?

A I sure did.

Q Can you tell us approximately when?

A Oh, I would say, World War I. Shortly after, in that period.

Q Did you ever have any occasion to do anything else on this property?

A Hay, cut hay, I did, yes.

[7] Q Did you harvest the hay yourself?

A Yes, yes.

Q For what years did you do that?

A I'd say '46, and then my dad, before '46, and then my dad before that cut hay, there.

Q For how many years?

A Maybe four or five years; I don't know how many. We cut a lot of nice hay, there.

Q You related to George Helzer?

A Brother.

Q Was George Helzer ever involved in any of the farming you described to this Court?

A Yes.

Q He assisted you in the farming?

A Yes.

Q What does your brother do, your brother George?

A He worked at the beach, too. He's retired, now. He's a mechanic at the beach.

Q Did your brother George have anything to do with catching muskrats?

A Yes.

Q Did he catch muskrats in and around this area?

A Yes.

Q Did he ever catch muskrats on this particular land?

A He did, at the drain on the other end, down where it's [8] low, there's a drain that goes through there, and he trapped there. I know. I think he trapped there this year.

\* \* \* \*

[13] THE COURT: Did you farm any of the part that is within the red lines?

A You mean in here?

[14] THE COURT: Yes. You, yourself, I mean, or your brother?

A Well, we farmed quite a lot of Metropolitan Beach property. This property runs down to the drain. The beach runs to the drain, and I think these people with this property, their property runs through the drain.

THE COURT: The property doesn't quite run quite to the drain. The testimony indicates it doesn't run quite as far as the drain. I think the testimony indicated that there are two ten acre pieces of property before you get to the drain.

Did you farm to the north of the drain, right up to the drain, at least—or did you farm south?

A South of the drain, north of the drain, we cut hay.

THE COURT: North of the drain, at least, once, you saw corn growing?

A I mean over a period of years, not just once. I saw beautiful corn there.

THE COURT: That was to the lake side of Jefferson?

A Lake side, yeah, right, right, right.

THE COURT: When would that have been, roughly, if you recall?

A I probably—was about 16, 17 years old, in that time [15] when they were really farming there, you know. But it's changed, now. I tell you. Of course, the water is a big problem.

Q (By Mr. Behringer) With regard to the water, have you ever seen this area when the lake levels have been high?

A Yes.

Q What happened to this area when the lake is high?

A Even where we live, you know, just a quarter of a mile, just across Prentis and Jefferson is just a little ways apart. And it's always—was—it's to my knowledge about seven years, she's up, once every year it seems to come up, and she goes back down again and everything would be fine and that's the way it seemed. But this last time, I never seen it that bad. Never.

Q Was the farming done when—during periods when the lake level was low

A Yes, but our farm, we farmed all the time, whether it was low or not, because we had good drainage. And now, your drainage is pretty shot out there, let's put it that way. You know, that is—

Q Not with regards to your farm?

A I mean, all of it. All the farms is pretty well shot, because when Metropolitan Beach pumped in, filled it all up, they changed the whole cycle of this property, with

our farm included. My brother had 20 acres, he's the [16] same thing, and it's just changing, changing in the last couple years. High water really did it.

Q Umm, okay. Do you know if your brother has caught any muskrats within the area of that red outline?

A Well, he did on the south end of it, 'cause it's here, comes down low.

\* \* \* \*

**REDIRECT-EXAMINATION**

BY MR. DANK:

Q Mr. Helzer, I wonder if you'd give us a brief description of what you understood the drainage to be, prior to it being changed by the filling of Metropolitan Beach.

THE COURT: Before they filled Metropolitan Beach?

A You see, there used to be a canal, been there for years, runs right up to this drain that we're talking about and it went right from there, right straight out to the lake. And when that did—it took care of a lot of this water, you know, what I mean. But since they pumped it in, they closed that canal down to the lake, dug a new one in from Black River, and the old canal where this property butts up wi<sup>th</sup> this goes in there, butts up against these people's property, and it's made a difference. [17] THE COURT: Where did the old canal used to run? Can you show me on the map?

A If we can see it.

THE COURT: It's not on there, but you have to tell me where you believe it would have been. Might be on some of the aerial photographs, the old ones, if we get back far enough.

A Well, here we are. And we're going to the lake. That would be right along the drain, here. Just inside—the drain comes down like this, and the old canal went right straight out to the lake, right straight down. It's still there, but they closed off the—down the other end.

They—the Huron, the park dug the—another canal in there, and it—it's working, but it ain't working like it did when the old one ran straight out. And that is the same drain that you're talking about ran right into the old canal. So, they shut it off down there and it made a difference.

Q Did he point out the area?

THE COURT: I couldn't really understand.

Q Would you tell us which way it ran across the beach?

A South from the drain. From your drain.

\* \* \* \*

[36] THE WITNESS: Right.

**FRED BIEDERMAN**

having been previously sworn, was examined and testified upon his oath as follows:

**CROSS-EXAMINATION**

BY MR. BEHRINGER:

\* \* \* \*

[39] Q Was the Corps going to tag line land within this area there that could be dumped?

A This area, it was my understanding was permissible if we maintained this figure, here.

THE COURT: Have you maintained the figure of 575.7?

A And on reviewing last night, what I had, my recollect was that I used this figure 575.7 here as probably being—'cause we walked over this area, here. Mr. Melvett and I walked over and we determined that that area would not come under the jurisdiction; that ours was over the jurisdiction because we walked on it. We didn't consider that as being wetlands in there. That's what the Corps asked us to do, determine what we consider—so that is how we arrived at this line, here. These

were copies that was given to me by the Corps of Engineers. When I got thinking farther on it, I think that is the point that I determined was dry land, so when this figure here was given to me, I referred to this, and I said, well, we walked in here; so I'm going to assume that it is correct. IGLD.

I don't know what that means.

\* \* \* \*

[51] HERBERT GLASCOW,

having been first duly sworn, was examined and testified upon his oath as follows:

#### DIRECT-EXAMINATION

BY MR. DANK:

Q Mr. Glasow, let us have your business address and your occupation.

A Building official, Harrison Township, 38151 L'Anse Creuse.

Q What period of time have you been a building official?

A Ten years, in February.

Q What are your duties?

A I'm in charge of building, zoning, and ordinances.

\* \* \* \*

[55] THE COURT: What did they do with that ditch at the time they built the dike? I didn't clearly understand what they did. You were there, I wasn't.

A They filled it up to form an earth dike.

THE COURT: In other words, they eliminated the drainage, and instead, they built an earth dike all along Jefferson?

A Correct.

THE COURT: And that was done by the Macomb Road Commission?

A By the Macomb Road Commission.

THE COURT: And that would have been along the entire east side of the parcel we're involved in here?

A And further south.

THE COURT: And further south.

A Right up to Metropolitan Parkway.

\* \* \* \*

[60] Q There's been no effort to reopen the ditch along Jefferson Avenue?

A No, there's been no request. I shouldn't say that, I've asked the county to remove that, but now they claim they don't have the rubber tired front end loader to remove it; but I had some of the dike moved up close to the pub which was pass Helzer, which was hazardous for people backing out of the pub. I had some of that removed.

[61] Q By pub you mean a tavern?

A The name is the Pub.

Q It faces Jefferson, it's north of Helzer?

A That's correct.

\* \* \* \*

[62] Q Were you given a design by the Corps, or was it your job to provide one to the Corps?

A Well, I think it was a combination.

Q Did you have any instructions from the Corps as to what your role or what the design would be that you would partake in?

A Only the elevation that it should be.

Q How about the direction or location on the property?

A They were going the shortest route they could go in order to protect the people within Jefferson and South River Road, because they were paying the bill.

Q Did you have any conversation with anyone from the Corps of Engineers about the possibility of diking a perimeter of this property?

A Yes, Mr. Price.

Q Okay. You are indicating someone in the audience, is [63] that correct?

A Correct.

Q But the gentleman's name is Price?

A Richard Price.

Q Do you remember when that conversation took place?

A Prior to building the dike.

Q What conversation did you have with him?

A If they would go to the outside perimeter of this area.

Q What indication did he give you?

A They would go the shortest route, because they were still paying the bill.

Q Was there an objection to diking the perimeter of this property?

A No.

\* \* \* \*

[66] FITZ BRIDGES,

having been first duly sworn, was examined and testified upon his oath as follows:

\* \* \* \*

[67] DIRECT-EXAMINATION

BY MR. DANK:

Q Mr. Bridges, would you give us your business address?

A 273 South Gratiot Avenue, Mount Clemens, Michigan.

Q Tell us just briefly how long you have been in the business of being a civil engineer?

A I started in 1946. Upon discharge of service, registered as a land surveyor in 1927. As a professional engineer in 1952. Practicing at that time.

Q Can you tell us whether or not your practice is confined itself to any particular geographic area?

A Southeastern Michigan primarily, Macomb County, Oakland, Lapeer, St. Clair County, primarily 95 per cent of the work is in Macomb County.

Q You've shown us in your resume that for some period of time you were a consulting engineer in the employ of Harrison Township in Macomb County?

A That is true.

\* \* \* \*

[85] Q Can you tell us what the lowest point along—  
are?

THE COURT: Are they all legible?

A I have one right—the elevations that we've shown in here are in the majority low elevations of 574, plus we have 574.45, 574.55, 574.54, 574.54—53—55—I think I averaged them out. I think it came to 574.6. The low was 574.45. Those are based on IG LD, International Great Lakes Data, furnished the bench mark by the Corps. We have titled our elevations into that bench marking.

MR. BEHRINGER: That's marked is it?

MR. DANK: I don't think it is.

A I saw a little tab on it.

MR. DANK: Here it is—okay. I'm [86] looking for Exhibit 52. This is it.

Q (By Mr. Dank, continuing): Have you seen Exhibit 52?

A Yes, I have.

THE COURT: I didn't get that, after you said—

A 574.6. Mathematical average, lowest elevation, I think, is 574.45.

Q Mr. Bridges, have you been on this property?

A Yes, I have.

Q Can you tell us what if anything this land exhibits by way of slope?

A Physically, it would be impossible for me to show any difference in elevations. Basically, it's very very flat.

Q From the levels that you've taken, can you give any indication as to whether or not there is a trend of slope from these figures?

A Basically, the trend, and this is through other work that we've done in the area, I mentioned that I have done work in the Saban land drain. The land drain is to the southeast, basically towards the Black River area, Jefferson Avenue, causes that artificially, that was built up. That's land across Jefferson Avenue is high—

Q All right. Now, from Exhibit 52, have you attempted to determine the number of times that the arithmetical means of these elevations would have been lower than the [87] monthly mean average as a result recorded on Exhibit 52?

THE COURT: You're talking about elevations of the south end of the property?

MR. DANK: Yes, yes.

THE COURT: Or are we talking about the south end and around the corner?

MR. DANK: We're talking about all of these.

A Using this—this being 52 ideological survey track using elevations as shown on that, as the monthly average water levels, for my determination, and it's—I don't have the tabulated figures of—that were presented yesterday, but these are strictly from the drawing, and so it's a little difficult to get it maybe 100 per cent. We try to be on the fair side, here. If you use the elevation 574.6 as an average, I counted 103 months which the monthly average, monthly mean average was over the elevation 574.6. That's 103 months since, including, 19—1898 to 1976 inclusive. 936 came out to 11.004 per cent. Say 11 percent of the time that the water levels are above 574.6. And 44 of those 103 months were in the last three years. I have a drawing which I marked it on, which I used, that shows possibly, graphically the figures I've given.

Q Have you computed how many times the monthly mean average [88] exceeded the lowest point that you found along the line?

A No, I have not. '74, '75, I don't have that. Possibly, I had taken another average figure before we took this elevation down to the south, and west, I used an average of 74.8, which we had at the north. 77 month or 8—two tenths, there made a difference of three per cent, possibly. If it went down another 1500th, it would be one or two per cent grade higher. If not—

Q Have you computed 575.7, which was the figure you used on Exhibit 4?

A 575.7 was a figure that was given to us as being the high water—575.7 is the high water mark, IGLD, and I put that, I put a line in my drawings that elevation 575.7. And at that time, I find that thirteen months of the 936 months are above the 575.7, again. Again the majority of those being in the last three years. High water that we've had in '72, '73, '74, '75.

Q Do you know what percentage that is?

A 1.39 per cent, 1.4 per cent.

\* \* \* \*

January 21, 1977 (afternoon session)

[65]

THOMAS P. GOUGH,

called as a witness on behalf of the Defendant, having first been duly sworn by the Court, was examined and testified on his oath as follows:

DIRECT EXAMINATION  
BY MR. DANK:

Q Witness, will you tell us your occupation, please?

A I'm presently employed by the Macomb County Public Works Commissioner as more or less of a troubleshooter, and [66] I'll explain that. I am in charge of the program under Public Act 347. That's the Sediment and Erosion Control Act.

I also am responsible for all taps and crossings that are made related to Macomb County drains. I also am

responsible for any programs relating to the Clinton River that are carried out by the Public Works Commissioner, and in addition to that, I help the fellows in Parks and Recreation. That's the Parks and Recreation of Macomb County.

\* \* \* \*

[68] Q Let me just ask you this: Prior to going to work for the Macomb County Drain Commissioner—or Department of Public Works—excuse me—would you tell us how you were employed?

A I was employed by the United States Soil Conservation Service. That's a branch of the United States Department of Agriculture. My official title was District Conservationist. I was employed by the Soil Conservation Service from January 2nd of 1956 until July of 1974. During that time I was stationed first in Ann Arbor in 1956. Then I was stationed in Emmett and Charlevoix Counties from 1956 until 1961. In 1961 in March I was transferred to Mt. Clemens, and I worked in Macomb County—

\* \* \* \*

[71] Q (By Mr. Dank, continuing): During the period of time that you were assigned to the Mt. Clemens area, namely from 1961 until '75, did you have an opportunity to become acquainted with the agricultural areas of the county?

A Yes, I did because my main responsibility as a district conservationist was to assist land owners in solving problems related to soil and water and other resources. In order to do this, I had to learn very much about the area of Macomb County; well, not only agriculture, but the urban uses, too.

Q In your work with the people engaged in agricultural activities in Macomb County, did you have any experience with attempting to identify or classify wetlands?

A Yes, I did. One of our responsibilities related to wetlands pertained to a program that is called the Ag-

ricultural Conservation Program. Under the regulations of that program, which is administered by the Agricultural Stabilization and Conservation Service, was the handling of money, and this money was to be used to pay part of the cost of installing various conservation practices, and included in these practices were drainage measures, such as final drainage or ditching or land development, but anything related to drainage required [72] that we made a decision—that I made a decision in work that I did as to whether land was wetland, Class 3, 4 or 5, and on the referral from the A.S.C. I was required to state very emphatically that land was either wetland Class 3, 4 or 5 or it was not. If it was, we were not allowed to work on it for agricultural drainage. If it was not, then we were allowed to.

Q Do you have anything with you that establishes the basis for determining what classifications of wetlands were as they were defined by the United States Soil Conservation Service?

A Yes. I have some sheets here that define each of eight different classes of wetland.

Q Now, what are those sheets taken from?

A These were sheets that were developed by the Soil Conservation Service and the United States Fish and Wildlife Service.

\* \* \* \*

[81] Q (By Mr. Dank, continuing): Now, does this exhibit [DX 28] attempt to define Lamson soils?

A Yes, it does.

Q All right. Now, can you take us to the beginning of that definition and show us whatever this exhibit has to say about the characteristics of Lamson soil?

A Yes. Turn to Page 24 and the white sheets in the front. Did everyone find that? It's in the white sheets. All these soils are listed alphabetically. You'll see on Page 24 it says, "Lamson Series," and over on the right-hand side of the page about halfway down on Page 24, it says, "Lamson Fine Sandy Loam (zero to two percent of slopes)."

THE COURT: I see.

THE WITNESS: Now, that describes that particular mapping unit. Now, for a definition of the typical Lamson soil, you would look on the left-hand side of the page and read down through those two or three paragraphs. If you wish, I would show you what I mean. It says:

"The surface layer of a typical Lamson soil is black fine sandy loam about ten inches thick. The subsoil, about 14 inches [82] thick, is gray, very friable fine sandy loam that contains yellowish-brown mottles. The substratum is gray, very friable silt and very fine sand with olive and yellowish-brown mottles."

Then it goes on to tell you a little more about the soil, about it being nearly level, being poorly drained and the type of natural vegetation that you would expect on there and the uses that are made of this soil throughout the county. I may interject at this point that there are approximately 5,000 acres of Lamson sandy loam in Macomb County, and it's scattered in various parts of the county.

I might point out to you another place in this book that you can find out some more information if you turn to Page 72 and Table 4. It's an engineering table. Excuse me. Turn to Page 74, I believe. You'll have to go over it. This again is all alphabetical, but if you read about a third of the way down the page, if you read across the page following the titles that are listed on the top of each column, you'll see that you can find out an awful lot about this soil.

For instance, it indicates that the seasonal water table is less than one foot from the surface. This correlates with the written description [83] that said it's a poorly drained soil.

Q (By Mr. Dank, continuing): Now, let me just see—  
A Yes.

Q —if I can interrupt you at this point.

A Sure.

Q Is that something that holds true even if it's not inundated periodically by water from a navigable body of water?

A Yes, sir. I can show you in this exhibit or in the field the same type of soil with these characteristics in Macomb Township and Shelby Township, which is somewhere around 18 to 20 miles northwest of this site.

\* \* \* \*

[85] Q (By Mr. Dank, continuing): So if I understand what you are saying, the impact of that is just as the soil will not drain itself well, it will not carry water from, say, the Clinton River to the center part of the parcel either?

A This is right. This is right.

Q So the influence of the water in Lake St. Clair and the influence of the water in the Clinton River will not impact this property substantially; is that a fair statement?

A As hydraulic underground flow, this is what I mean. I [86] will say this, that the weather conditions, the amount of precipitation that causes the lake level to rise also affects this area, the precipitation on the land, but this is a relatively flat area. It is poorly drained because of the nature of the soils, and if the lake levels are up, the effect that the lake level would have through Black Creek would be that this land could not drain, but it does not necessarily mean that the lake is going to back all the way up into there. It will only to the extent that it seeks its own level on the surface and adjacent to the drain and ditches, but not that it's going to flood out all over the land or flood out through the soil and come up. Water just doesn't do that.

Q Can you say, then, is this a fair statement, that the influence of either Lake St. Clair or the Clinton River would be that influence that it has by spilling surface waters onto this property?

A Yes, that's my personal opinion.

Q All right.

[110] Q And what is your opinion?

A My opinion is that this land could be classified at the [111] present time, the south end of the property could be classified as probably wetland Class 3, the north area, what they refer to as the 20 acres, would be in the middle type classification at this current time, but if we had had an extended dry spell and I were to look at it, I would make the decision that it was not wet.

Q When you're saying at this current time, are you saying taking into consideration a permanent classification it would be wetland?

A I wouldn't say a permanent classification because I would say this can vary.

Q Do you have a permanent classification of the property?

A No, I do not have a permanent classification.

Q And why is that?

A Well, because of different or changing conditions, depending on precipitation and the length of time that the water would stand on the land, because when you determine wetland in the classifications that we use, it specifies the amount of time on these sheets. If I may, I will clarify this.

Skipping Type 1, because this is not Type 1, but in Class 2, it said the soil usually is without water, without standing water during most of the growing season that is waterlogged within a few inches of its surface. This would be Class 2, and this would be [112] what they call inland fresh meadows. Then Class 3, the soil is usually waterlogged during the growing season. Often it is covered with as much as six inches or more of water, and I don't feel that that site would always be covered with that much water during the growing season. In other words, I am saying there would be dry years or years of lesser precipitation where the water would not be standing on there.

Q All right. Do you have any idea what percentage of the years it would be that way?

A Just an educated guess on it. I would think that probably less than five years of the time that it would be wet over a long period of time, like the period that was referred to here in the court from 1898, or whatever time it was, shortly before the turn of the century to now with the precipitation that we've had, I would guess it's probably less than five percent of the time that you would really classify that as Class 3 or wetter, which would be Class 4 or 5.

Q All right.

A I don't feel that it would be any longer than that.

Q When you said the southern portion of that property, can you indicate it on the exhibit next to you?

A Well, this would be in the area south of the property in this exhibit, and this is Exhibit what, 59?

[113] Q Yes.

A It would be in that area towards the south end. Like this would be the south River Road and this would be Jefferson. Down in this area you'd be more apt to find Class 3 or Type 3, but up in this other area, which is a little higher, I would say you are more apt to find at best a Class 2, and this would only be a temporary thing.

Q All right. Now, the area down below where you defined it as Class 2, is that also a temporary—

THE COURT: Class 3.

MR. DANK: I am sorry, Class 3.

A I didn't hear the last part of your question.

Q (By Mr. Dank, continuing): Would that be temporary?

A Yes, that would be temporary, too. It would be depending upon the amount of precipitation and on the length of time that the water stayed on the ground.

Q All right. Can you say whether or not from what you know about the property and its history that you would anticipate seeing wetland vegetation on the property as a normal course?

A On the south end near the Savan Drain, which is a little depressional down toward that end, I would say you would probably find it quite often, but on the northern part of it, I don't think you would.

Q Okay. The word I have used is normal. How would you [114] characterize it? Would it be normal?

A I would say it would be abnormal to see it all the time on the property. I think that the majority of the time you would not find it on there.

Q Periodically it could be though, is that correct?

A Yes.

Q Is that the statement you are making?

A Right.

Q Such as we're experiencing at this time?

A Right.

Q Now, you mentioned the classification of a meadow. Is that the property is saturated to within a few inches of the surface, is that correct?

A Right. That's from this definition.

Q All right. Now, you earlier told us that this property retains water, is that correct?

A Yes, it does.

Q Now, as a natural tendency, would it retain water to within a few inches of the surface?

A Well, sometimes. The water table, the natural water table would be up within several inches of the surface, but that water table would recede or be lower if you had an extended dry spell. In other words, it's a fluctuating water table. It does not always stay within a couple of inches.

[115] Q All right. Now, even if you had a dry spell, would you anticipate that this property would still have a high water table?

A Yes, yes, I would.

Q And would that be true even though it might not be in close proximity to the Clinton River or Lake St. Clair?

A Yes, this is my opinion.

Q You do know that there are other types, other areas in Macomb County that have this type of soil?

A This is true, and this is what I'm basing my statement on.

Q These characteristics follow through even though they're not close to the lake?

A Right.

Q Or other bodies of water?

A Right.

THE COURT: Now, let me ask you where there's classifications in this book, what page were those on, the classifications you are using?

THE WITNESS: Do you mean for the—

THE COURT: For the meadow.

THE WITNESS: No, that was on this other exhibit.

THE COURT: Oh.

THE WITNESS: On the other one.

[116] THE COURT: That's right.

THE WITNESS: That's Class 2.

THE COURT: I have it here.

THE WITNESS: Or Type 2 would be the meadow and then Type 3 would be inland shallow fresh marshes.

THE COURT: All right. I have it.

Q (By Mr. Dank, continuing): Does the County of Macomb control the fill of this kind in any way?

A The control, if you will, is not on the filling itself, but it's on the control of erosion on a site like this or other sites. I'll clarify that by saying I believe you're referring to Public Act 347 that the Macomb County Public Works Commissioner is charged with the responsibility of enforcing that act.

The requirements in the act are that anyone who is moving earth that is in proximity to a waterway must come up with a plan, a definite engineering plan showing how they will contain the sediment on the site to prevent sedimentation of waterways, and that is what the county would be involved in.

Now, the county would not have any say as to what material would be put on the site. I mean, I am speaking now when I say county in regards to Act 347, but they would be responsible for seeing that [117] the way that this was done would not create a hazard to adjacent or adjoining waterways, and that would count road ditches, county drains, natural water courses or other bodies of water, and it is also interpreted that it would not be done in such a way that the soil would wash onto an adjoining property. This would be a requirement that the sediment and the erosion control would be such that no sediment is to leave the site.

Q Has a permit been obtained by the defendants—

A Yes.

Q —from the county?

A Yes, it has.

#### CROSS EXAMINATION

BY MR. BEHRINGER:

[128] Q Would a drainage ditch help you reduce the water table on that property?

A If there were artificial or let's say mechanical lift stations to remove the water—

Q Why are you requiring mechanical lift stations?

A Because of the topography.

Q What do you know about the topography of this area?

A I know that it's relatively flat. It does slope slightly to the south and southeast.

[164] MR. BERHINGER: The whole area is a Lamson soil?

THE WITNESS: Yes, but the whole area would not be affected by the lake is what I'm saying.

THE COURT: Are you drawing the boundary line on Exhibit 37, the red square?

THE WITNESS: No, I did not. I said it was too far inland. Another reason I say that, if this were true, if you check your soils book you'll find that south of Metropolitan Beach Highway—I know I'm getting off the site, but there's the same kind of soil and there are very, very many houses down there, and if this were true that the water, as the water level came up on Lake St. Clair, if this was going to move laterally through that soil, those houses would be collapsing because there would be no support for them.

Q (By Mr. Behringer, continuing): Would you know if that soil is topographically a little higher?

A Not much.

Q Not much?

A It's pretty much the same down through there. If you [165] check the geodetic survey map, it will show you that there are definite contour lines that make that very similar.

Q Does that area have any wetland in it?

A There are some, but not very many.

Q Do homes have basements in that area?

A Yes, there are basements down there, I know. Refer, if you will, to, let's see, that would be Page 31, I think. Let me just double-check to see what I'm talking about.

THE COURT: Thirty-one of what?

THE WITNESS: Of the sheets in the back.

THE COURT: Of your sheets in the back?

THE WITNESS: Right.

THE COURT: All right.

THE WITNESS: Sheet 31 and Sheet 34.

THE COURT: Okay.

THE WITNESS: If you will notice on Sheet 31, there is a very large amount of Lamson soil that's been mapped. The road at the bottom of the map is Fourteen Mile Road. The next one up is Fifteen Mile. You'll notice that there is a lot of Lamson soil even west of the I-94 expressway and adjacent to it along Harper Road. It runs

up through there. There's quite a [166] bit of Lamson and then up in the northeast corner of that particular map, up around Sixteen Mile Road, the Metropolitan Beach Highway, there is a lot of Lamson soil up in there, too, and there's some there just above where it says or near the N in Harrison, you'll notice that there is no obstruction between that Lamson and the lake, yet there are houses along there.

\* \* \* \*

[180] Q Let's talk about lateral transmission of water through soils. If there was a free transmission of water under this soil, what would happen to South River Road?

A Well, the road would probably not be available. The road would probably collapse if water moved freely through it, because anytime—let me qualify that, if I may.

Anytime a water is moving, it will move any movable soil particles, and this would reduce the bearing capacity or stability of the road if the water were moving, and it would shift those soils and the road would tend to collapse.

Q Would the same thing be true of houses that are built let's say, for instance, in these subdivisions?

THE COURT: That is all made land, though, that sub?

THE WITNESS: That's made land.

MR. DANK: But if the soil were free [181] to transmit the water from one canal to the other, seeing that most of these homes have water on all sides of them, would it not be true that the house would not be supported in the soil?

A This is true.

Q (By Mr. Dank, continuing): So whether it is made land or the land is in its natural state, ground does have a tendency to absorb water only for a certain distance, isn't that correct?

A This is true, right.

Q I thought I had some chalk here. Just so that we

can illustrate this principle, I am going over to the blackboard behind my chair here and I will draw a horizontal line which we will assume is ground level, and there becomes a slope into a depressed area in which Lake St. Clair is in.

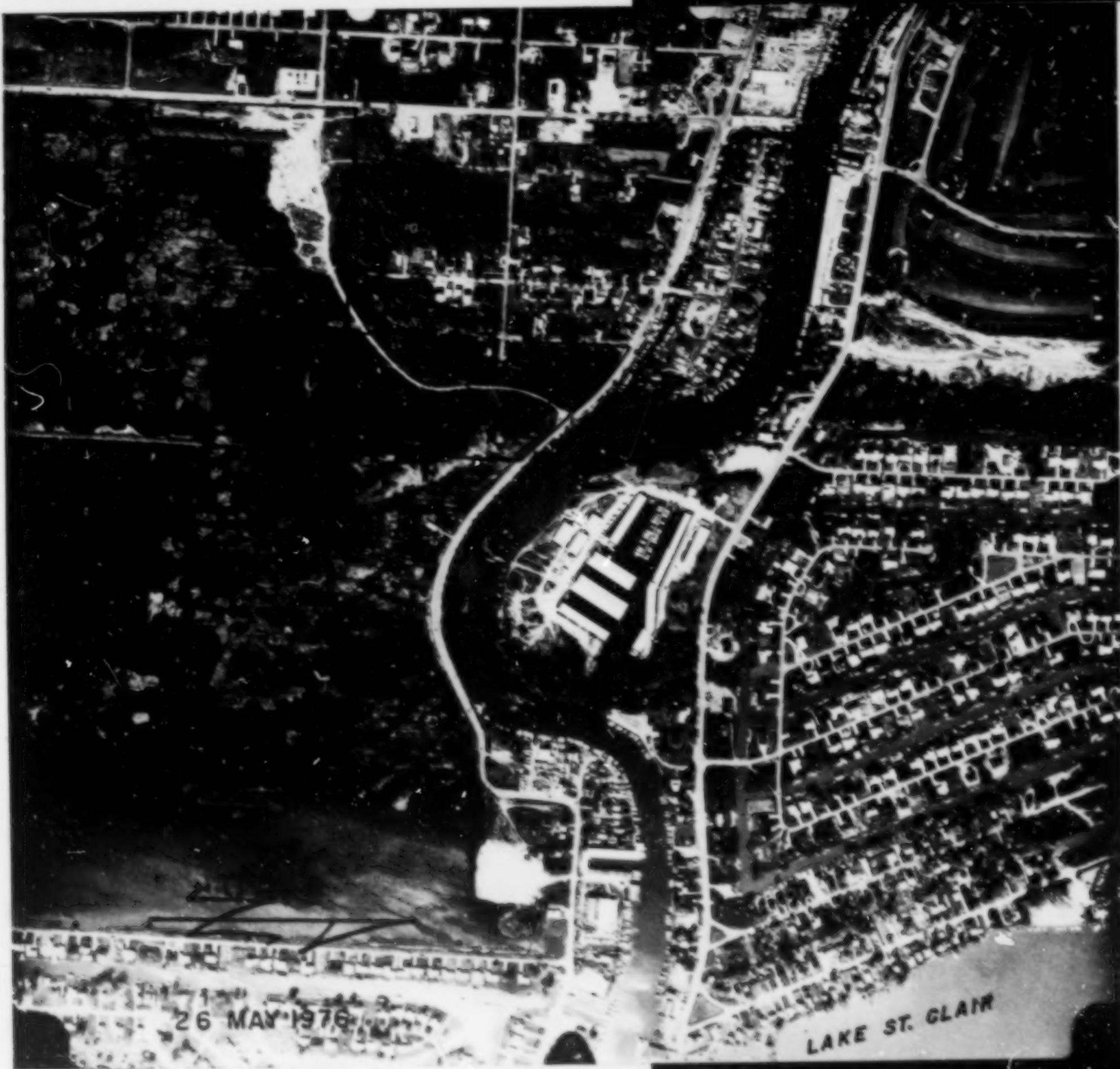
Would there be some point back along the shoreline at which the water moving laterally through the soil from Lake St. Clair would stop?

A Yes.

Q All right. Now, with a Lamson soil, do you have an idea how far in land the influence of the lake water would cease to be of importance?

A I would estimate that to be a distance of between 50 and 60 feet, at the very most.

PLAINTIFF'S EXHIBIT 1: AERIAL PHOTOGRAPH  
OF RESPONDENTS' PROPERTY, MAY 26, 1976



SUPREME COURT OF THE UNITED STATES

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No. 84-701

UNITED STATES, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

---

**ORDER ALLOWING CERTIORARI**

Filed February 19, 1985

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The petition herein for a writ of certiorari to the  
*United States Court of Appeals for the Sixth Circuit* is  
granted.

Justice Powell took no part in the consideration or  
decision of this petition.

(8) Office-Supreme Court, U.S.  
FILED

No. 84-701

MAY 6 1985

ALEXANDER L. STEVENS,  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## **QUESTION PRESENTED**

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "wetlands" is limited to areas that support aquatic vegetation only by virtue of "frequent flooding" from adjacent streams, lakes, or seas.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. So far as the United States is aware, Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc. Cf. Pet. App. 22a n.2.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-701

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 729 F.2d 391. The judgment order of the district court (Pet. App. 42a-44a) is unreported. Two previous opinions of the district court (Pet. App. 22a-31a, 32a-41a) are also unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on March 7, 1984. A petition for rehearing was denied on June 8, 1984 (Pet. App. 20a-21a). On August 27, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 5, 1984. The petition was filed on November 1, 1984, and granted on February 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATIONS INVOLVED

Relevant provisions of the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at Pet. App. 45a-48a.

## STATEMENT

1. The court of appeals has held that respondent's property is not the kind of "wetland" that is subject to the regulatory jurisdiction of the United States Army Corps of Engineers and hence that respondent may fill in its property without securing a permit under Section 404 of the Clean Water Act of 1977 (CWA), 33 U.S.C. 1344. The issue presented by this case is the extent to which the Nation's "wetlands" are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction. Before turning to the facts of this case, we set forth a brief description of "wetlands" generally and the statutory and regulatory scheme for their protection.

a. In general, and not as a strictly legal or jurisdictional matter, wetlands are areas characterized by vegetation growing in soils that are periodically or normally saturated with water. See generally Office of Technology Assessment, Congress of the United States, OTA-0-206, *Wetlands: Their Use and Regulation* (1984) [hereinafter cited as *Wetlands*] ; Fish and Wildlife Service, U.S. Dep't of the Interior, *Classification of Wetlands and Deepwater Habitats of the United States* (1979) [hereinafter cited as *Classification*] ; Council on Environmental Quality, *Our Nation's Wetlands, An Interagency Task Force Report* (1978) [hereinafter cited as *Our Nation's Wetlands*]. Familiar types of wetlands are marshes, swamps, and bogs. Wetlands occur along gradually sloping areas between uplands and deep-water environments, such as rivers and lakes, or form in basins that are isolated from

larger water bodies. *Wetlands* 3. Freshwater wetlands, which account for approximately 90% of total remaining wetlands in the country, may be fed by ground water, surface springs, streams, run-off from the surrounding terrain, or a combination of these sources. *Our Nation's Wetlands* 10. Water levels in freshwater wetlands rise and recede in part according to rainfall, so that at times they may be quite dry. *Ibid.*

It is widely recognized that wetlands perform unique ecological services. For example, many wetlands purify water by holding nutrients and recycling pollutants, they provide flood protection by retarding surface runoff from rainwater and shielding upland areas from storm damage, and they also provide vital food resources and habitat for fish and wildlife. *Our Nation's Wetlands* 19-27; see also 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). In a 1977 congressional debate, it was reported that wetlands provide \$140 billion worth of flood control and water purification services. 123 Cong. Rec. 38994 (1977) (remarks of Rep. Lehman).

b. The Clean Water Act is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).<sup>1</sup> In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into the Nation's waters, excepting only discharges made in compliance with other sections of the Act, including Section 404.

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge of dredged or fill

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<sup>1</sup> In 1972, Congress passed extensive amendments to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, and for the first time established a comprehensive federal program for the control and abatement of water pollution. The 1977 Amendments to the FWPCA changed the popular name of the statute to the Clean Water Act. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this brief.

material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12115. Those regulations limited the Corps' assertion of jurisdiction under Section 404 to the same waters previously regulated by the Corps pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* Thus, "navigable waters" for both Section 404 and Rivers and Harbors Act purposes initially were defined by the Corps as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce" (33 C.F.R. 209.120(d)(1) (1974)). Under this definition, commonly referred to as the "traditional" definition of navigable waters, the Corps exercised extremely limited jurisdiction over freshwater wetlands; only wetlands subject to such regular inundation by lacustrine or riverine flow so as to be considered part of a navigable water body were encompassed by the regulations.<sup>2</sup>

The Corps' initial interpretation of the scope of its jurisdiction under Section 404 met with substantial opposition. The Environmental Protection Agency interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, EPA Administrator, to Lt. Gen. W.C. Gribble, Jr., Chief, Corps of

<sup>2</sup> In freshwater bodies, only those wetlands below the ordinary high water mark were regulated, and jurisdiction in tidal areas was limited to wetlands below the mean high water mark. 33 C.F.R. 209.260(j) and (k)(ii) (1974).

Engineers).<sup>3</sup> In addition, the House Committee on Government Operations called upon the Corps to abandon its narrow view of Section 404 jurisdiction and to use that provision to protect wetlands above the mean high water line from the damage caused by the discharge of dredged or fill material. H.R. Rep. 93-1396, 93d Cong., 2d Sess. 23-27 (1974). Several federal courts agreed that the Corps had given Section 404 a more restrictive reading than had been intended by Congress. *E.g., United States v. Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). In *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act" (*ibid.*).

In response to the order in *NRDC v. Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31320 (1975); 33 C.F.R. 209.120(d)(2) and (e)(2) (1976).<sup>4</sup> On July 19, 1977, the Corps published

<sup>3</sup> EPA administers the CWA except as otherwise explicitly provided. 33 U.S.C. 1251(d). See also note 11, *infra*. The only responsibilities assigned to the Corps under the CWA are those contained in Section 404.

<sup>4</sup> The Phase 1 regulations, which were made immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. "Adjacent wetlands" were to be determined by a prevalence of aquatic vegetation and periodic inundation; neither the ordinary high water mark nor the mean high tide line necessarily marked the shoreward limit of jurisdiction. 40 Fed. Reg. 31321, 31324, 31326 (1975). The Phase 2 regulations, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase 1 waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* The Phase 3 regulations, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed

its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37122.

Pursuant to the final regulations published in 1977, the Corps' jurisdiction under Section 404 extends to all "wetlands" that are "adjacent" to (1) navigable waters as traditionally defined, (2) the tributaries of traditional navigable waters, and (3) interstate waters, whether or not navigable, and their tributaries. In addition, intra-state lakes or streams and isolated wetlands are subject to the Corps' jurisdiction if the use, degradation, or destruction of those areas could affect interstate commerce. See 33 C.F.R. 323.2(a).<sup>5</sup> The regulations define the critical terms "wetlands" and "adjacent" as follows (33 C.F.R. 323.2(c) and (d)):

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

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by the regulations (e.g., perched or isolated wetlands and wetlands adjacent to tributaries other than primary tributaries). *Ibid.*

<sup>5</sup> The Corps' current definition of "waters of the United States," including "wetlands," is a reworded, but substantively unchanged, version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See 47 Fed. Reg. 31795 (1982). Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs, regardless of which agency administers a particular program.

2. Respondent Riverside Bayview Homes, Inc. owns approximately 80 acres of property in Macomb County, Michigan, near Lake St. Clair. In November 1976, Riverside submitted an incomplete permit application to fill a portion of its property. Without completing the application and without waiting for the Corps' decision on its request for a permit, Riverside commenced fill activity. When Riverside refused to comply with a cease and desist order issued by the Corps, the United States initiated this action in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside's unauthorized filling of wetlands. Riverside defended its actions by asserting that none of its property was subject to Clean Water Act jurisdiction. Following evidentiary hearings, the district court (then-District Judge Cornelia Kennedy) entered a preliminary injunction and later a permanent injunction prohibiting further filling activity on that portion of the property below the elevation of 575.5 feet until a Corps permit was obtained.

The district court found that the area subject to the injunction was an "adjacent wetland" under the Corps' 1975 interim final regulations.<sup>6</sup> This "wetland"-area is contiguous to Black Creek, a navigable water and tributary of Lake St. Clair. Pet. App. 23a. It was undisputed that Riverside's property is predominantly vegetated with cattails, marsh grasses, and other wetlands plants—i.e., vegetation that is typically adapted for life in saturated soil conditions. *Ibid.* The district court found that, except for periodic surface water inundation from their overflow, the nearby water bodies (Black Creek, Clinton

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<sup>6</sup> The relevant interim final regulation provided (33 C.F.R. 209.120(d)(2)(h) (1976)): "'Freshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In relevant part, the final regulation eliminated the words "periodically inundated" and substituted "inundated or saturated by surface or ground water at a frequency and duration sufficient to support \* \* \* [aquatic vegetation]" (33 C.F.R. 323.2(c)). See page 6, *supra*.

River, and Lake St. Clair) are not the cause of the saturated conditions that support the wetlands vegetation found on Riverside's property (*id.* at 25a).<sup>7</sup> Instead, the district court found that the growth of the wetlands vegetation was principally caused by saturation associated with the type of soil found on the property—the soil drains poorly, resulting in a high water table and water on or near the surface (*id.* at 24a-25a). The record reflects that Riverside's property is part of a larger undeveloped area that has exhibited the wetlands characteristics of moisture and vegetation for decades. See, *e.g.*, J.A. 51-53, 58-60, 64-67; Pet. App. 23a-24a. The environmental functions of the area were described by experts as providing habitat for muskrats and waterfowl and furnishing food resources for fish in Lake St. Clair. *E.g.*, J.A. 41-42, 47, 62-63, 72, 75-76.

Having found that Riverside's property is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction" (33 C.F.R. 209.120(d)(2)(h) (1976)), the district court separately considered the requirement of "periodic inundation" found in the 1975 interim final regulation (*ibid.*). The court had considerable difficulty with this aspect of the regulation (which has since been eliminated to avoid confusion), but ultimately concluded that "periodic" required "more than five" floods (Pet. App. 31a) and found that the elevation of 574.9 feet had been surpassed by flooding on six "occurrences" (some of several years' duration) in the last 80 years (*id.* at 30a). By

<sup>7</sup> This finding was based on the district court's conclusion that there is no hydrologic connection between Riverside's property and the nearby water bodies (Pet. App. 32a-37a). In context, however, it is clear that the finding refers to the absence of an underground connection by which water flows from those water bodies to the property. The court made no findings on the reverse question whether surface water drains from the property to the water bodies; the record suggests that it does because the property slopes toward Black Creek. See J.A. 104, 114; DX 33.

adding half a foot to account for normal monthly fluctuation, the court arrived at its conclusion that Riverside's property below the elevation of 575.5 feet was a "wetland" subject to the Corps' jurisdiction (*id.* at 31a).

Riverside appealed. On motion of the United States, the court of appeals remanded the case to the district court for consideration of the effect of the Corps' 1977 revised final regulations. District Judge Gilmore applied the new regulations to the facts found by Judge Kennedy and again concluded that the area was an adjacent wetland under the regulations. The court permanently enjoined Riverside from filling without a permit. Pet. App. 42a-44a. Riverside appealed anew.

3. The court of appeals reversed, holding that Riverside's property was not a "wetland" under the 1977 regulations and was not subject to the Corps' jurisdiction under the Clean Water Act (Pet. App. 1a-19a). The court held that the Corps' jurisdiction over "wetlands" is limited to areas in which aquatic vegetation is directly attributable to frequent flooding from adjacent navigable waters. Applying this test, the court concluded that Riverside's property was not a "wetland" for jurisdictional purposes because inundation by the periodic flooding from adjacent water bodies had not been sufficiently frequent to be the cause of the aquatic vegetation found on the property. Pet. App. 10a-12a.

The court of appeals initially characterized its "frequent flooding" test as an interpretation of the Corps' revised definition of "wetlands" (33 C.F.R. 323.2(c)). The court stated (Pet. App. 10a):

The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the

wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Although the court quoted a portion of the pertinent regulation at several points in its opinion (Pet. App. 10a, 11a, 15a), nowhere did it discuss the regulation's applicability to areas characterized by a prevalence of aquatic vegetation that is attributable in whole or in part to saturated soil conditions or ground water (33 C.F.R. 323.2(c)). Instead, the court held that the regulation requires "frequent flooding by waters flowing from 'navigable waters' as defined in the Act" (Pet. App. 15a).

The court reasoned that its narrow interpretation of the regulation was necessitated by what it perceived as both statutory and constitutional constraints on the Corps' jurisdiction. Pet. App. 13a-16a. Because the CWA extends jurisdiction to "waters of the United States," the court questioned whether Congress intended to regulate "wetlands" at all. *Id.* at 13a (emphasis added). In addition to its view that Congress may not have intended to extend jurisdiction over the property at issue, the court reasoned that its narrow construction was required to avoid the potential problem of an unconstitutional taking (*id.* at 14a-15a).

The government petitioned for rehearing en banc. The petition was denied, but the panel expanded its initial opinion to make clear its view that the Clean Water Act itself, in addition to the Corps' regulation, does not authorize federal jurisdiction over "wetlands" not created by "frequent flooding" from adjacent navigable waters (Pet. App. 20a-21a). The government's interpretation of the Clean Water Act, which is reflected in the Corps' regulations, was rejected as "over broad and inconsistent with the language of the Act in question" (*id.* at 21a).<sup>8</sup>

<sup>8</sup> During the pendency of the appeal in this case, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre

#### SUMMARY OF ARGUMENT

I. A. Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the United States Army Corps of Engineers was given the responsibility of issuing permits for the discharge of dredged-or-fill material into the "waters of the United States." 33 U.S.C. 1344 and 1362(7). The Corps has issued jurisdictional regulations defining the "waters of the United States" to include, *inter alia*, "wetlands" that are adjacent to navigable water bodies and are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c). If a wetland area falls within this regulatory assertion of jurisdiction, then the landowner must apply for a Corps permit before engaging in the discharge of dredged-or-fill material. The mere assertion of regulatory jurisdiction does not, however, mean that a permit will be denied. On the contrary, it merely allows the Corps the opportunity to conduct a site-specific evaluation of the landowner's dredge-or-fill proposal to ensure that the critical ecological functions performed by wetlands are not unnecessarily destroyed.

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area filled between May 26, 1976, and January 16, 1977. The after-the-fact permit request was denied based on the Corps' conclusion that "the existing fill has had an adverse impact on the wetland and its function as a flood-water storage area, water quality enhancement basin and fish and wildlife habitat."

In addition to its request for after-the-fact approval of its earlier fill, Riverside sought permission to fill 30.6 more acres. The State of Michigan denied a state permit for this proposed fill. Accordingly, the Corps also refused to approve the proposed work because its regulations (see 33 C.F.R. 325.8(b)) provide that permits will not be granted by District Engineers if a permit required by state or local law has been denied. Riverside did not seek judicial review of the Corps' permit denials, and the court of appeals did not address the subject, presumably because its ruling on the scope of the Corps' jurisdiction made it unnecessary for Riverside to obtain any Corps permits.

Apparently unaware of the distinction between a threshold jurisdictional determination and an actual decision on a permit application, the court of appeals concluded that the Corps' interpretation of its jurisdiction over "adjacent wetlands" would prevent landowners "from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows" (Pet. App. 20a). Unhappy with this prospect, the court of appeals created its own test for wetlands jurisdiction, holding that the Corps may assert Section 404 jurisdiction only over those wetlands that exhibit aquatic vegetation attributable to "frequent flooding" from adjacent lakes, streams, or seas.

The lower court's "frequent flooding" test is flatly inconsistent with the intent of Congress and fails to accord any deference to the agencies (in this case, the Corps and the Environmental Protection Agency) entrusted with the administration of the statute. Both as originally enacted in 1972 and as amended in 1977, Congress made clear that the purpose of the Clean Water Act was to promote and maintain the integrity of the Nation's waters by controlling pollutant discharges at their source. Congress intentionally abandoned its previous reliance on concepts of navigability and instead made water quality the touchstone of the statutory and regulatory program. Moreover, Congress repeatedly demonstrated its understanding of the vital role played by wetlands in the maintenance of water quality.

Of particular significance is the fact that Congress was fully aware of the geographic reach of the Corps' regulatory program under Section 404, which had generated substantial controversy between 1972 and 1977. Congress's response to the controversy was to exempt certain activities, such as normal farming activities, from the reach of the statute. After extensive debate, however, Congress refused to narrow the geographic reach of Section 404 as implemented by the Corps' regulations. Thus, Congress clearly ratified the Corps' interpretation of the

scope of its Section 404 jurisdiction. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983). In these circumstances, it was error for the court of appeals to disregard the legislative history of the 1977 amendments in favor of its own self-created "frequent flooding" test for wetlands jurisdiction. The error was all the more apparent in light of the fact that every other circuit to address the issue has recognized that Congress intended to exercise jurisdiction over the Nation's waters, including wetlands, to the full extent of its power under the Commerce Clause.

B. Contrary to the court of appeals' analysis, therefore, the only relevant constitutional provision is the Commerce Clause, and not the Fifth Amendment. The lower court's concern that a narrow reading of the Corps' Section 404 jurisdiction was required to avoid a "taking problem" was misguided and premature. No "taking" of private property arises from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. The court of appeals therefore erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.

II. In addition to holding that the Corps' interpretation of Section 404 is inconsistent with the language of the Clean Water Act, the court of appeals also held that Riverside's property is not a "wetland" within the meaning of the Corps' regulations. This ruling was plainly inconsistent with the regulatory language. The court's "frequent flooding" test, which it purported to derive from the regulations, totally ignores the fact that the regulations also assert jurisdiction over areas that support

a prevalence of wetlands vegetation attributable to ground water or saturated soil conditions. The court also ignored the fact that the regulations are consistent with congressional intent, reflect good wetlands science, and promote ease of administration for landowners and regulators alike.

In light of Congress's demonstrated concern for the promotion of enhanced water quality, any jurisdictional test that focuses on the *source* of the waters creating wetlands vegetation makes no sense. Wetlands perform the same important functions whether they are fed by "frequent flooding," ground water, surface run-off, rain-water, or types of soil that retain moisture. The Corps' regulations recognize this fact by asserting jurisdiction over areas that are inundated *or* saturated at a frequency and duration sufficient to support wetlands vegetation.

This regulatory definition of wetlands not only accords with congressional intent, but it reflects good science. Although there are many different types of wetlands, the single feature that wetlands have in common is exposure to water. The source of that exposure, however, is totally irrelevant to the valuable functions that wetlands perform.

In addition, the Corps' definition of wetlands is administratively sound. If the Corps is to fulfill Congress's intent to protect ecologically important wetlands, then its threshold jurisdiction must be construed broadly. The determination whether particular wetlands should be subject to restrictions on development by virtue of Section 404 can only be made on a case-by-case basis, after the Corps has had the opportunity to evaluate the environmental impacts of the proposed project and to weigh those impacts against the public benefits of the project. The court of appeals' crabbed approach to the threshold jurisdictional issue wholly pretermits the permit review process for vast areas of wetlands and will inevitably

lead to water pollution and destruction of wetlands that would not otherwise occur.

Finally, the Corps' regulatory definition of wetlands jurisdiction has the virtue of ease of application for landowners and regulators alike. By focusing primarily on vegetation, the threshold jurisdictional inquiry usually can be answered through visual inspection. Under the court of appeals' "frequent flooding" test, on the other hand, time-consuming and expensive hydrologic studies would be required to determine the existence, the frequency, and the direction of the flow of water, and then to evaluate its causal relationship to aquatic vegetation. Requiring landowners to partake in such a complex inquiry as a threshold matter undoubtedly would jeopardize public cooperation with the Corps' program.

III. The southern portion of Riverside's property is a wetland within the meaning of the Clean Water Act and the Corps' implementing regulations. Expert witnesses for both parties agreed that the property exhibits a prevalence of wetlands vegetation, and the record demonstrates a total absence of upland species of vegetation. In addition, the property is saturated at a frequency and duration sufficient to support the wetlands vegetation found there. The soil on the property drains poorly and has a high water table, with water on or near the surface most of the time. Riverside's property also is "adjacent" to a navigable waterway within the meaning of 33 C.F.R. 323.2(d) because it is contiguous to Black Creek, a navigable waterway and tributary of Lake St. Clair. Finally, there is no dispute that Riverside's property performs precisely the type of valuable ecological functions that Congress intended to protect when it enacted Section 404. Accordingly, the judgment of the court of appeals holding that Riverside need not apply for a Section 404 permit should be reversed.

## ARGUMENT

At the outset, it should be clearly understood what is involved in this case and what is not. The only issue before the Court is whether the Clean Water Act authorizes the Corps of Engineers to assert regulatory jurisdiction over those wetlands whose "aquatic" character is attributable to causes other than "frequent flooding" from navigable lakes, streams, or seas. The court of appeals failed to appreciate that this threshold jurisdictional inquiry is wholly distinct from the question whether a permit to discharge dredged-or-fill material should be granted in a particular case. Recognition of jurisdiction does nothing more than allow the Corps to consider whether the wetlands values that Congress sought to protect would be jeopardized by a particular project; it does not in and of itself mean that any and all activity on a particular parcel of land will be prohibited. See pages 30-31, 40-43, *infra*.

The position of the United States, as set forth in the Corps' 1977 regulations, is that jurisdiction over wetlands—as distinct from the decision to grant or deny a permit—is to be determined by geographic proximity ("adjacency") to a navigable water body, coupled with the presence of saturated soil conditions sufficient to support a prevalence of wetlands vegetation. 33 C.F.R. 323.2 (c) and (d).<sup>9</sup> The court of appeals rejected this position as a matter of law, concluding that it was "inconsistent with the language of the Act" (Pet. App. 21a). As a result, the court of appeals could not and did not consider whether the Corps should have issued a permit for the filling of Riverside's property. Instead, by adopting a crabbed interpretation of the Corps' threshold jurisdic-

<sup>9</sup> In this brief we address only the scope of the Corps' jurisdiction under the CWA over wetlands that are adjacent to traditional navigable water bodies and their tributaries. The Corps' regulations also assert jurisdiction over certain "isolated" wetlands (see 33 C.F.R. 323.2(a)(3)), but Riverside's property does not fall within that category. See pages 29 note 20, 46-47 & note 40, *infra*.

tion even to consider the effect on wetlands of particular dredge-or-fill projects, the court of appeals wholly pre-terminated the permit review process (see pages 40-43, *infra*) that Congress intended as the mechanism to ensure that wetlands are not destroyed without a prior determination of the ecological importance of the particular wetland and the impacts of the proposed activity on that wetland. As we demonstrate below, the court of appeals was able to arrive at this result only by ignoring well-settled principles of statutory construction and by substituting its judgment for that of the agencies charged with the administration of the statute.

### I. THE COURT OF APPEALS IGNORED WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION IN INTERPRETING THE SCOPE OF SECTION 404 WETLANDS JURISDICTION

The court of appeals' exclusive reliance on the statutory language, with its concomitant failure to examine the Act's legislative history, led it to an interpretation of the statute that is flatly inconsistent with congressional intent. The court of appeals observed (Pet. App. 13a) that Congress "may, indeed, have meant to extend the protections of the Act beyond the straightforward" statutory definition of "navigable waters" but concluded that it was "not clear" from the statute how far the Corps' jurisdiction extends in the case of wetlands.<sup>10</sup> Having found a lack of clarity in the statutory language, it was manifestly inappropriate for the court of appeals to ignore the legislative history. With specific reference to the CWA, this Court has held that, "however clear the words may appear on 'superficial examination,'" courts may not ig-

<sup>10</sup> The court of appeals' assertion (Pet. App. 13a) that the language of the statute makes no reference to "wetlands" is inaccurate. Section 404(g)(1) refers to "adjacent" "wetlands" as regulated waters. 33 U.S.C. 1344(g)(1). Thus, the statutory language itself casts doubt on the court of appeals' conclusion that the adjacent wetlands at issue in this case are not "waters of the United States."

nore the legislative history in discerning the meaning of a statutory term. *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940)). Thus, the court of appeals erred in resting its decision solely on the bald conclusion that the Corps' interpretation of the CWA was "inconsistent with the language of the Act" (Pet. App. 21a). Though the statutory term "waters of the United States" may at first blush be deceiving, even a cursory review of the legislative history of the CWA, both as it was passed in 1972 and as amended in 1977, quickly and conclusively dispels any notion that Congress intended the Section 404 program to be limited by the traditional concepts of navigability resurrected by the court of appeals. See pages 19-27, *infra*.

The court of appeals compounded its analytic error by refusing to accord any deference to the administrative interpretation of the statute.<sup>11</sup> This Court has repeatedly emphasized that reviewing courts are precluded from substituting their judgment for that of an agency, particularly with respect to technical matters or to a determina-

<sup>11</sup> The fact that the Corps initially took a narrower view of its jurisdiction under Section 404 is of no moment in this case. The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). EPA has consistently supported a broad interpretation of the scope of Clean Water Act jurisdiction (see pages 4-5 & note 3, *supra*). Shortly after the Act was passed in 1972, EPA established a policy of preserving wetland ecosystems in the administration of its regulatory activities and grant programs. The agency took this action because "[t]he Nation's wetlands \* \* \* are a unique, valuable, irreplaceable water resource" (38 Fed. Reg. 10834 (1973)). With particular regard to the type of wetland at issue in this case, EPA recognized that (*ibid.*):

Fresh-water wetlands support the adjacent or downstream aquatic ecosystem in addition to the complex web of life that has developed within the wetland environment. The relationship of the fresh-water wetland to the subsurface environment is symbiotic, intricate, and fragile.

tion, including jurisdiction, that has been assigned primarily to the agency administering a statute. See, e.g., *Chemical Manufacturers Ass'n v. NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Chevron U.S.A. Inc. v. NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977). Congress delegated substantial authority to EPA and, with respect to permits for the discharge of dredged-or-fill material, to the Corps for implementation of the Clean Water Act. See, e.g., 33 U.S.C. 1311, 1342, and 1344. In the absence of an explicit statutory definition of covered wetlands, those agencies were given implicit authority to determine administratively the precise scope of wetlands jurisdiction. See *Chevron U.S.A. Inc. v. NRDC*, slip op. 5-6. Since the agencies had done so, the court of appeals was precluded from substituting its own construction of the statute so long as the administrative interpretation was a reasonable one.

Had the court below consulted the legislative history and followed these principles of judicial review, it would have recognized that the Corps' interpretation of its jurisdiction under Section 404 is a reasonable construction of the statute that should have been upheld.

## **II. THE CORPS' ASSERTION OF SECTION 404 JURISDICTION TO REGULATE DISCHARGES OF DREDGED OR FILL MATERIAL INTO WETLANDS ADJACENT TO STREAMS, LAKES, OR SEAS COMPATIBLE WITH CONGRESSIONAL INTENT**

### **A. The Act's Objectives And Legislative History Demonstrate That Congress Intended To Regulate Discharges Of Dredged Or Fill Material Into "Wetlands" Beyond The Limits Of Traditional Navigable Waters**

1. In 1972, Congress substantially rewrote the federal law governing water pollution in order to "restore and maintain the chemical, physical, and biological integrity

of the Nation's waters." 33 U.S.C. 1251(a). The "integrity" of the Nation's waters is a broad concept—"a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. 92-911, 92d Cong., 2d Sess. 76 (1972). Congress's objective was to achieve that level of water quality that provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (33 U.S.C. 1251(a)(2)). The strategy adopted to achieve these goals was to control the discharge of pollutants at their source. See generally *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). Congress recognized that restricting Clean Water Act jurisdiction to those relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. The Senate Report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)):

Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.

Accordingly, the statute prohibits the unauthorized discharge of any pollutant—including dredged or fill material—into "navigable waters," defined as the "waters of the United States, including the territorial seas." 33 U.S.C. 1311(a), 1344, 1362(6), 1362(7). Congress's use of the term "waters of the United States" was a deliberate rejection of the more limited concept of traditional navigable waters, in recognition of the fact that that narrow focus was ill-suited to the Act's water quality goals. The House Report stated (H.R. Rep. 92-911, *supra*, at 131):

One term the Committee was reluctant to define was "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. To alleviate its fears, Congress deleted the word "navigable" from the Act's definition of "navigable waters."

The Conference Committee explained that (118 Cong. Rec. 33699 (1972) (emphasis added)):

The Conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes*.

Congress thus clearly understood that traditional concepts of navigability had nothing to do with combatting water pollution and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" directly tied to water quality concerns.<sup>12</sup> Moreover, Congress intended to assert federal jurisdiction over the sources of pollutant discharges into the hydrologic cycle to the maximum extent permissible under the Commerce Clause in order to improve and maintain water quality. In other words, the only constraint on regulatory jurisdiction intended by Congress was the limit of the Commerce Clause power to control water pollution.<sup>13</sup>

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<sup>12</sup> The criteria that the Corps must consider when evaluating permit applications for dredged or fill materials exemplify Congress's water quality concerns. Section 404(b)(1) of the Act, 33 U.S.C. 1344(b)(1), directs the Corps to evaluate permit applications by applying guidelines developed by EPA in conjunction with the Corps. EPA's guidelines (published at 40 C.F.R. Pt. 230) must take into account, *inter alia*, the effect of discharges of dredged or fill material on fish, shellfish, and wildlife; effects on recreational, economic, and aesthetic values; and changes in aquatic ecosystem diversity, productivity, and stability. Sections 403(c)(1) and 404(b)(1), 33 U.S.C. 1343(c)(1) and 1344(b)(1). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Section 404(c), 33 U.S.C. 1344(c). Thus, Congress sought through the permit requirement and evaluation process to prevent unnecessary discharges causing significant adverse impacts on water quality.

<sup>13</sup> Historically, federal regulatory involvement in water-related activities focused primarily on the navigability of waterways, but

2. Whatever doubt may have existed concerning the intended reach of the CWA over wetlands was completely laid to rest by the 1977 amendments to the statute. The 1975 interim final regulations promulgated by the Corps in response to *NRDC v. Callaway, supra*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.<sup>14</sup> An amendment to limit the geographic reach of Section 404 to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 97-105 (1977). Congress rejected the proposal to limit the geographic reach of Section 404 because it wanted a permit system with "no gaps" in its

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it has long been recognized that other water-related interests can be addressed pursuant to the Commerce Clause, including, inter alia, ecological concerns. See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); *Zabel v. Tabb*, 430 F.2d 199, 203-204 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). Regulation of wetlands for the purpose of addressing environmental problems is undoubtedly within Congress's power under the Commerce Clause. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); *United States v. Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). Cf. *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (CWA regulation of an intrastate lake that affects interstate commerce is constitutional); *United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-1329 (6th Cir. 1974) (CWA jurisdiction over non-navigable tributaries of navigable streams is constitutional).

<sup>14</sup> *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph).

Rather than alter the *geographic* reach of Section 404, Congress amended the statute by exempting certain *activities*—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See 33 U.S.C. 1344(f).<sup>15</sup> The Senate Report, which explained the approach ultimately adopted by the Conference Committee, demonstrates that the decision to leave the geographic scope of Section 404 intact was an affirmative approval of the administrative interpretation of the term "waters of the United States." The report stated (S. Rep. 95-370, 95th Cong., 1st Sess. 75 (1977)):

Initial consideration of the section 404 controversy stimulated discussion on the extent of the waters in which discharges of dredged or fill material will be regulated.

The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent.

\* \* \* \* \*

To limit the jurisdiction of the Federal Water Pollution Control Act with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.

The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the pri-

\* <sup>15</sup> Congress also added several other provisions to Section 404, including provisions designed to streamline the permit process and to allow states to administer portions of the program. Altogether, 16 new subsections were added to Section 404. Those amendments demonstrate that Congress thoroughly reexamined Section 404 when it passed the 1977 amendments. In these circumstances, Congress's decision not to alter the geographic reach of the section takes on added significance. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

mary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.<sup>[16]</sup>

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of Section 404, it was well aware that the Corps' 1977 regulations asserted jurisdiction over all adjacent wetlands and some isolated wetlands. For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

Interim final regulations were promulgated by the corps [on] July 25, 1975. \* \* \*

Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the corps revised its regulations to further streamline the program and correct several misunderstandings. \* \* \*

Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

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<sup>16</sup> This passage is particularly significant because it demonstrates beyond peradventure Congress's understanding of the Corps' phased-in expansion of Section 404 jurisdiction (see page 5 & note 4, *supra*). Instead of rejecting that approach, Congress specifically incorporated the Corps' regulatory scheme into the amendment authorizing partial delegation of the Section 404 permit program to the States. Section 404(g), 33 U.S.C. 1344(g).

Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries \* \* \*.

See also 123 Cong. Rec. 38967-38968 (1977) (remarks of Rep. Roberts). Moreover, Congress specifically referred to "wetlands adjacent" to traditional navigable waters as regulated waters in one of the amended Section 404 provisions, 33 U.S.C. 1344(g)(1). Congress's use of this regulatory term of art was an affirmative endorsement of the Corps' interpretation of the scope of its jurisdiction under Section 404.

This legislative history leaves no room for doubt that Congress intended adjacent wetlands to be treated as "waters of the United States." The proceedings leading to the 1977 amendments to the CWA offer a textbook case of congressional approval of administrative action. See *Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969).

Furthermore, the legislative history of the 1977 amendments clearly demonstrates Congress's continuing concern with water quality, its understanding of the significant relationship between wetlands and water quality, and its intention to regulate wetlands under the Section 404 program to promote enhanced water quality.<sup>17</sup> In

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<sup>17</sup> It also bears noting that Congress was fully aware that the dredged material and fill material with which Section 404 is concerned is not harmless "clean dirt." As Senator Baker noted (123 Cong. Rec. 26718 (1977)), dredged and fill materials often "contain a wide range of pollutants, including toxic substances." See also S. Rep. 92-414, *supra*, 74-75; 123 Cong. Rec. 26701, 26713-26714, 26720-26721 (1977) (remarks of Sens. Stafford, Hart, and Muskie); 123 Cong. Rec. 6792-6794 (1977) (statement of Khristine L. Hall, Natural Resources Defense Council, Inc.). And even in the case of fill material that is not contaminated by toxic pollutants, its mere placement into wetlands "can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds." 123 Cong. Rec. 26718 (1977) (remarks of Sen. Baker).

debating the proposal to restrict Section 404 jurisdiction, it was noted that more than half of the Nation's original wetlands already have been lost by filling, dredging, or draining and that the remaining areas are disappearing at a rate of 300,000 acres per year. 123 Cong. Rec. 26701, 26717 (1977) (remarks of Sens. Stafford and Chafee). Congress thought it essential to put a stop to this trend in order to achieve the water quality goals of the CWA. For example, Senator Baker, a sponsor of the 1977 amendments, stated (123 Cong. Rec. 26718-26719 (1977)):

[P]rotection of water quality must encompass the protection of the interior wetlands and smaller streams.

\* \* \* \*

We should be mindful of the fact that when these [wetland] areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

Senator Muskie, also one of the primary sponsors of the Act, expressed similar views (123 Cong. Rec. 26697 (1977)):

There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chafee); H.R. Rep. 95-139, 95th Cong., 1st Sess. (1977) (additional views of Reps. Edgar and Myers).<sup>18</sup>

In sum, the court of appeals' conclusion that it is "not clear" (Pet. App. 13a) that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history.

#### **B. Extensive Judicial Authority Supports A Broad Interpretation Of Section 404 Jurisdiction**

The court of appeals seemingly approached the issue before it as though it were a question of first impression. In fact, it is not, and, what is more, every other circuit to address the matter (either in the context of Section 404 or of other sections of the CWA that apply to "waters of the United States") has concluded that Congress intended in the CWA to assert federal jurisdiction over the Nation's waters to the full extent of its constitutional power, not limited by traditional concepts of navigability, and that the Corps' implementing regulations faithfully reflect that intent. See, e.g., *United States v.*

<sup>18</sup> Finally, Congress also was concerned about the economic impact of the loss of wetland areas on commercial fish harvests and water treatment and flood control costs. See, e.g., 123 Cong. Rec. 26716 (1977) (remarks of Sen. Chafee); *id.* at 26718 (remarks of Sen. Baker); *id.* at 38994 (remarks of Rep. Lehman). In addition to the estimate that wetlands provide \$140 billion worth of water purification and flood control services (see page 3, *supra*), specific illustrations of the economic impact of wetlands destruction were cited. In the early 1960s, for example, a channelization project on the Kissimmee River in Florida eliminated 45,000 acres of flood plain marshes. The unexpected result of the project was a "gross deterioration of water quality in the Kissimmee River and in Lake Okeechobee," into which the river flowed. To undo this damage, "it is going to cost a lot more money." 123 Cong. Rec. 26717 (1977) (remarks of Sen. Chafee).

*Huebner*, 752 F.2d 1235, 1239, 1240-1241 & n.9 (7th Cir. 1985); *Utah v. Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-916 (5th Cir. 1983); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 243, (4th Cir. 1979).<sup>19</sup>

These courts have all recognized that Congress's purposes, described at pages 19-27, *supra*, would be severely frustrated by an interpretation of "waters of the United States" that excluded areas, including wetlands, the destruction or pollution of which could threaten the more traditional waters to which the court below confined its concern. In contrast to the admittedly "narrow interpretation" of wetlands jurisdiction adopted by the court below (Pet. App. 13a), these courts have accorded Section 404 the broad reach intended by Congress in order to accomplish the Act's goal of controlling water pollution at its source. Repeatedly, courts have rested their interpretation of the scope of "wetlands" jurisdiction on the understanding that Congress intended to exercise its

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<sup>19</sup> But see *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). There, the court of appeals held that the Corps' jurisdiction did not extend to an area falling within the literal language of the Corps' "wetlands" definition because the area's wetland characteristics were the undisputed by-product of the Corps' dredging activities and the area was polluted and devoid of any value for fish, wildlife, or recreation. The court emphasized, however, that its conclusion turned on "peculiar facts and unique circumstances," and it did "not question the Corps' broad, plenary authority to protect, maintain, and restore our Nation's wetlands" (*id.* at 465-466). The court also noted that "[w]hen determining whether the Corps' jurisdiction over our Nation's wetlands extends to a particular area, a court must bear in mind Congress' intent to extend this jurisdiction to the full extent permissible under the Constitution" (*id.* at 465).

regulatory powers to the maximum extent permitted by the Commerce Clause. See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 916 n.33; *United States v. Tilton*, 705 F.2d at 431; *United States v. Byrd*, 609 F.2d at 1209-1211; *United States v. Holland*, 373 F. Supp. at 668-676.

For example, in *United States v. Byrd*, 609 F.2d at 1210, the court held that the Corps' assertion of Section 404 jurisdiction over wetlands adjacent to an intrastate lake was a constitutional exercise of power, consistent with congressional intent, because "filling activities, although they are local, have the potential for exerting a substantial economic effect on interstate commerce by an easily traced chain of causation." The court recognized that the effect of such localized filling activities would be to degrade the water quality of the lake they adjoined. *Ibid.* That degradation, in turn, would affect interstate commerce through its impact on the lake's value for recreation, fish, and wildlife. *Ibid.* See also *Utah v. Marsh*, 740 F.2d at 803-804.<sup>20</sup>

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 & n.21 (1981), this Court, citing *Byrd* and similar cases with approval, endorsed the same Commerce Clause analysis: "[We] agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have

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<sup>20</sup> Under the Corps' regulations, 33 C.F.R. 323.2(a)(3), a prerequisite to jurisdiction over an intrastate lake or wetland such as that involved in *Byrd* is a specific finding that its destruction or degradation could affect interstate or foreign commerce. Where, as here, the water body to which a wetland is adjacent is an interstate water or the tributary of an interstate water, no such showing is required. See 42 Fed. Reg. 37127-37128 (1977). The portion of Riverside's property at issue in this litigation (see pages 46-47 & note 40, *infra*) is adjacent to Black Creek, a navigable water and primary tributary of Lake St. Clair, an international boundary water linking the Great Lakes Huron and Erie.

effects in more than one State." The reasoning of the court below is, therefore, fundamentally at odds with the analytical approach to which all other courts have subscribed. The court below made no attempt to tie its self-created "frequent flooding" limitation to the goals and legislative history of the Act and seemingly rejected the Commerce Clause as an inadequate "limiting principle" (Pet. App. 21a). Contrary to the assumption implicit in the court of appeals' "frequent flooding" test, federal jurisdiction over wetlands is not predicated on the physical creation of wetlands by navigable water bodies. Rather, the ecological and environmental role of wetlands in the hydrologic cycle is the touchstone for federal jurisdiction.

### C. The Fifth Amendment Does Not Require A Narrow Construction Of Section 404

The court of appeals seriously erred in concluding that a narrow interpretation of Section 404 wetlands jurisdiction is required by the Just Compensation Clause of the Fifth Amendment. The fundamental flaw in the court's "taking" analysis was its erroneous assumption that the mere assertion of Section 404 jurisdiction amounts to the prohibition of "any development or change of such property." Pet. App. 14a. In fact, however, the scope of Section 404 jurisdiction determines nothing more than whether the owner of a wetland must obtain a permit before discharging pollutants onto his property. Moreover, the statute and the implementing regulations expressly contemplate the granting of permits in appropriate circumstances, see 33 U.S.C. 1344(b); 33 C.F.R. Pts. 320, 323; 40 C.F.R. Pt. 230, and, even if a permit is denied, it does not follow that all economically viable uses of the property will be foreclosed. Thus, a "taking" claim based only on a recognition of wetlands jurisdiction is altogether premature. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 927; *United States*

v. *Byrd*, 609 F.2d at 1211; cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295-296.<sup>21</sup>

A "taking" of private property cannot arise from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. See, e.g., *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-28; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, 149 (1974); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Thus, the court of appeals clearly erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.<sup>22</sup>

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<sup>21</sup> The sole authority for the court of appeals' "taking" analysis, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (Pet. App. 14a-15a), nowhere suggests that a narrow view of federal regulatory jurisdiction is required to avoid a taking "problem." In fact, *Kaiser Aetna* supports the opposite conclusion. There, this Court explicitly acknowledged that a privately owned lagoon converted by its owners into a marina was subject to federal regulatory jurisdiction. 444 U.S. at 174, 179. It was only the government's attempt to require the owners to provide the public with free access to the lagoon in the unique factual circumstances of that case that amounted to a "taking" for which compensation would be due. The Court noted that the access requirement would have deprived the owners of "the 'right to exclude,' so universally held to be a fundamental element of the property right" (*id.* at 179-180 (footnote omitted)). Subsequently, the Court refused to apply *Kaiser Aetna* to a land use regulation that, like the permit requirements of the Clean Water Act, did not extinguish any "fundamental attribute of ownership." *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

<sup>22</sup> Of course, a landowner also may obtain judicial review, pursuant to the Administrative Procedure Act, 5 U.S.C. 702, of a Corps decision to deny a permit application. See, e.g., *Buttrey v. United States*, 690 F.2d 1170, 1183 (5th Cir. 1982), cert. denied,

Finally, the taking analysis in any particular case is fundamentally factual. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). In a Section 404 case, for example, the court would have to determine, *inter alia*, whether denial of a permit deprived the landowner of all economically viable uses of his land. See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184, 1191-1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). The court of appeals conducted no such inquiry in this case, and thus its taking concerns were wholly speculative.<sup>23</sup>

In sum, the only constitutional provision relevant to this case is the Commerce Clause, not the Fifth Amendment. Congress's power to regulate wetlands emanates from the Commerce Clause because of the functional relationship between wetlands and the environmental goals of the Clean Water Act. The benefits that wetlands provide for water quality and management, and the concomitant negative impacts resulting from the dumping of fill and other pollutants into wetlands, leave no doubt that the exercise of Section 404 jurisdiction over "adjacent wetlands" is well within Congress's power.<sup>24</sup>

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<sup>23</sup> 461 U.S. 927 (1983); *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982).

<sup>24</sup> As noted (see note 8, *supra*), Riverside applied for and was denied a permit while this case was pending in the court of appeals. But the court of appeals did not decide whether the permit denial was proper or whether it effected a taking in the circumstances of this case, nor could the court have considered these questions inasmuch as Riverside never challenged the denial of the permit.

<sup>25</sup> The Commerce power, although it encompasses the protection and regulation of interstate navigation, is not, of course, limited to navigable waters or even to activities that affect such waters. Thus, Section 404 is not constitutionally restricted to what would be a permissible exercise of the federal navigation servitude. See *Kaiser-Aetna v. United States*, 444 U.S. at 173-180.

### III. THE CORPS' REGULATORY IMPLEMENTATION OF ITS JURISDICTION UNDER SECTION 404 IS BASED ON SOUND LEGAL, SCIENTIFIC, AND ADMINISTRATIVE CONSIDERATIONS

In addition to holding that the Corps' interpretation of the statute was "inconsistent with the language of the Act" (Pet. App. 21a), the court of appeals also construed the Corps' regulatory definition of wetlands (33 C.F.R. 323.2(c)) to exclude Riverside's property (Pet. App. 10a-12a). The court's ruling was plainly inconsistent with the regulatory language. Moreover, the court failed to recognize that the Corps' regulatory definition of wetlands represents both a scientifically and administratively sound approach to the task of implementing congressional intent.

#### A. Nothing In The Corps' Definition Of "Wetlands" Requires That They Be Created By "Frequent Flooding" From Adjacent Navigable Water Bodies

The court of appeals was of the view that the Corps' regulatory definition of "wetlands" is limited to areas in which aquatic vegetation is caused by "frequent flooding" by waters from adjacent streams, lakes, and seas (Pet. App. 15a). This interpretation finds no support whatsoever in the language of the regulation, which encompasses not only areas that are "inundated" by adjacent navigable water bodies but also areas that are "saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c) (emphasis added). "The [1977] revision makes it clear that inundation is not necessary if actual saturation is present." *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 290 (W.D. La. 1981), aff'd in part and rev'd in part on other grounds, 715 F.2d 897 (5th Cir. 1980). Nowhere in the Corps' regulations is there a suggestion that the water inundating or saturat-

ing an area must flow from a lake or stream. On the contrary, the water inundating or saturating a wetland may originate from groundwater, rainwater, surface run-off, or a combination of these and other sources. See 42 Fed. Reg. 37128 (1977); cf. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 933; *United States v. Byrd*, 609 F.2d at 1208. Thus, the court of appeals' requirement that water flowing from adjacent navigable waters cause the wetland vegetation—thereby eliminating saturated or inundated areas fed by surface run-off, groundwater, rainwater, or a combination of sources—burdens the administrative definition with limiting concepts untraceable to the regulatory language.

Contrary to the court of appeals' suggestion (Pet. App. 9a, 12a n.3), the preamble to the Corps' 1977 regulations does not support the court's construction of the regulatory definition of "wetlands." The court of appeals relied on one sentence in the preamble, and it read that sentence out of context. The sentence stated that "[t]he abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (1977).<sup>25</sup> The court then observed that the presence of wetlands vegetation on Riverside's property might be "'abnormal' in the sense that [the wetland vegetation] was supported not by inundation but unusual soil conditions" (Pet. App. 12a n.3). But the saturated soil conditions that characterize Riverside's property do not constitute an "abnormality" in the sense intended by the preamble. Rather, as the complete preamble discussion makes clear, the Corps' only intent was to exempt from regulation "those areas that once were wetlands and part of an aquatic system, but

<sup>25</sup> Conversely, the term "normal" was added to the 1977 regulations (33 C.F.R. 323.2(c)) to make clear that areas that are characteristically saturated or inundated but have had wetland vegetation destroyed in order to eliminate them from Section 404 jurisdiction are nonetheless considered "wetlands" for regulatory purposes. 42 Fed. Reg. 37128 (1977).

which, in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37128 (1977).<sup>26</sup> Riverside's property, which has exhibited the wetlands characteristics of saturation and aquatic vegetation for decades, is not within that category (see J.A. 52-53, 56, 58-60, 64-67, 69-71; pages 44-46, *infra*).

The court of appeals also misunderstood the import of the Corps' intent to assert jurisdiction over a wetland area "as it exists" now, and "not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (1977). By confining its self-created jurisdictional test to instances of inundation from "frequent flooding," the court was able to conclude that Riverside's property is not a wetland "as it exists' now" (Pet. App. 10a, 11a). But the Corps intentionally eliminated the requirement of "periodic inundation" (33 C.F.R. 209.120(d)(2)(h) (1976)) because that phrase had been erroneously construed "as requiring inundation over a record period of years." 42 Fed. Reg. 37128 (1977). This was never the Corps' intent (*ibid.*):

Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Thus, the court clearly erred in concluding that the presence or absence of "frequent flooding" was conclusive on

<sup>26</sup> Thus, the Corps' regulation does require that the presence of wetland vegetation be attributable to wet or saturated conditions, as opposed to the "abnormal" presence of wetland species in a dry or upland environment. However, inundation or saturation may be intermittent, rather than constant; the inundation or saturation need only be at a "frequency and duration sufficient to support aquatic vegetation." 33 C.F.R. 323.2(c). Cf. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 913.

the question whether Riverside's property is a wetland "as it exists" now.

Moreover, while vegetation and hydrology are the primary factors relied upon to identify wetlands, soil also is considered a wetlands indicator. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 917-918.<sup>27</sup> Accordingly, the court of appeals plainly erred in suggesting that the type of soil found on Riverside's property—soil characterized by a high water table, poor drainage, and water at or near the surface—is a reason for concluding that the prevalence of wetlands vegetation represents "abnormal" growth in an upland area (Pet. App. 12a n.3). On the contrary, the soil type is confirmatory evidence that the wetland vegetation results from saturated conditions, as contemplated by the regulatory definition.

In sum, the Corps' regulation contains no requirement that wetland vegetation be caused by frequent flooding from navigable waterways, as opposed to other water sources. In reading frequent flooding and causation restrictions into the regulation, the court of appeals clearly disregarded the well-established principle that an agency's interpretation of its own regulations is entitled to deference by a reviewing court, particularly where, as here, the matter involves technical expertise. See, e.g., *Ford*

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<sup>27</sup> In *Avoyelles*, the court upheld EPA's methodology and application of the regulatory definition of "wetlands" to a particular tract of land. EPA's methodology is discussed in a report attached as an appendix to the court's opinion. 715 F.2d at 930-934. The report explained that "[w]hile vegetation is perhaps the most important factor in applying the [wetlands] definition," some species considered to be wetlands vegetation "may sometimes grow in soils that are only rarely saturated" (*id.* at 931). Hydrologic or soil data are therefore relevant factors used to verify the significance of wetlands vegetation (*id.* at 931-933). The report observed that "[m]uch of the tract consists of soil types generally recognized as wetlands soils because of their tendency to hold moisture and drain poorly" (*id.* at 932). Thus, the wetland to be regulated in *Avoyelles* "consist[ed] of those areas where the evidence showed that the presence of wetland species was confirmed by either inundation or saturated soils" (*id.* at 933).

*Motor Credit Co. v. Milhollin*, 444 U.S. 555, 556 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 910.

#### B. The Regulatory Definition Of "Wetlands" Is Scientifically Sound And Serves To Promote Congress's Water Quality Concerns

Having failed to consult the legislative history of Section 404, the court of appeals was unaware of Congress's intention to promote enhanced water quality and the necessary role that wetlands play in achieving that goal. Thus, the court failed to appreciate that the Corps' regulatory definition of "wetlands" (33 C.F.R. 323.2(c)) is a scientifically sound description of areas performing the multiple ecological services that scientists generally attribute to wetlands. The presence of vegetation and saturation or inundation are, for example, consistent with the scientific identification of wetlands developed by the United States Fish and Wildlife Service for purposes of the National Wetlands Inventory authorized by Congress in Section 208(i)(2) of the CWA, 33 U.S.C. 1288(i)(2).<sup>28</sup> Scientists have developed a complex taxonomic

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<sup>28</sup> The National Wetlands Inventory, for which Congress authorized the expenditure of \$6 million, was intended to generate scientific information on the characteristics and extent of the Nation's wetlands in order to provide technical assistance to state agencies regulating wetlands. See 33 U.S.C. 1288(i)(1) and (2); 123 Cong. Rec. 26715-26716 (1977) (remarks of Sen. Stafford); *Classification* iii; R. Tiner, Fish & Wildlife Service, U.S. Dep't of the Interior, *Wetlands of the United States: Current Status and Recent Trends* 2-3 (1984) [hereinafter cited as *Current Status*]. The Fish and Wildlife Service, approaching the classification of wetlands from an "ecological standpoint" (*id.* at 3), has adopted a broader definition of wetlands than the regulatory definition used by the Corps for jurisdictional purposes. For example, hydric soil alone is sufficient to classify an area as a wetland under the definition employed by the Fish and Wildlife Service. See *Classification* 3. The Corps' regulatory definition, on the other hand, requires a combination of wetlands vegetation and inundation or saturation of the soil (33 C.F.R. 323.2(c)).

structure for differentiating types of wetlands (see generally *Classification* 4-33), but the single feature that nearly all wetlands have in common is "soil or substrate that is at least periodically saturated with or covered by water." *Id.* at 3. This exposure to water—from whatever source—"creates severe physiological problems for all plants and animals except those that are adapted for life in water or saturated soil." *Ibid.*

Thus, the fact that the Corps' regulatory definition of wetlands attaches no significance to the source of water is fully consistent with scientific understanding. Scientists recognize that ground water, surface run-off, or precipitation may be the source of the water feeding wetland areas. See *Our Nations Wetlands* 10; J. Kusler, Environmental Law Institute, *Our National Wetland Heritage: A Protection Handbook* 37 (1983) [hereinafter cited as *Our National Wetland Heritage*]. From a functional standpoint, there is no merit to the court of appeals' requirement that "frequent flooding" from an adjacent navigable water body be the cause of wetland vegetation. The beneficial services provided by wetlands are not limited by, nor dependent on, any particular test of causation. Rather, areas having the physical characteristics of wetlands (*i.e.*, saturation and vegetation) typically provide scientifically and economically demonstrable ecological services and resource values. See generally *Wetlands* 25-28, 37-61.

For example, wetlands purify water by removing nutrients, processing chemical and organic wastes, and reducing sediment loads. See *Current Status* 18.<sup>29</sup> Wet-

<sup>29</sup> The processes by which wetlands perform these functions are too complex to be fully understood by scientists, much less explained in detail here. It is clear, however, that vegetation is important to these processes (*Wetlands* 48 (footnote omitted)):

Dissolved nutrients (*i.e.*, nitrogen and phosphorous) may be taken up directly by plants during the growing season and by chemical absorption and precipitation at the wetland soil surface. Organic and inorganic suspended material also tends to

lands located in the transition zone between uplands and permanent water bodies are particularly good water filters because they intercept run-off from land before it reaches the water body. *Ibid.* Other functions performed by wetlands, such as controlling floods by retarding the flow of surface run-off or providing habitat and nutrition for fish and wildlife,<sup>30</sup> likewise do not depend upon any particular water source as the cause of the wetland vegetation.

In short, the court of appeals' "frequent flooding" test bears no relationship to the best scientific understanding of the role of wetlands. By excluding functionally important wetland areas from coverage under the Corps' regulations, the court has failed to recognize Congress's intent to protect the economic and ecological value of wetlands. The Corps' regulatory definition, on the other hand, reflects good wetlands science.

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settle out and is trapped in the wetland. Some pollutants associated with this trapped material may be converted by biochemical processes to less harmful forms; some may remain buried. Others may be taken up by the plants growing in the wetland and either recycled or transported from it.

\* \* \* With some toxic chemicals, like degradable pesticides, the fact that these pollutants are secured in the wetland long enough to degrade is important. Other toxics either remain buried or are taken up by the wetland plants.

See generally *Wetlands* 48-52; *Our National Wetland Heritage* 37.

<sup>30</sup> Although some wildlife (*e.g.*, waterfowl and muskrats) rely directly on wetland vegetation for food, its primary food value is indirect. *Current Status* 19. When a wetland plant dies, it fragments into small particles to form detritus that flushes into adjacent waters. Detritus is the base of an aquatic food web that supports "higher consumers," such as commercial fish (*ibid.*). Although commercially and recreationally important fish may not consume detritus directly, they feed on animals (*e.g.*, snails, worms, small fish, crustaceans) or aquatic insects that employ detritus as a major food source (*ibid.*). Most aquatic animals depend, either directly or indirectly, on this resource (*ibid.*).

**C. The Corps' Regulatory Definition Of Its Section 404 Jurisdiction Ensures That Critical Wetlands Will Receive The Protection Intended By Congress And Promotes Ease Of Administration For Regulators And Landowners Alike**

1. If Congress's intention to protect wetland values is to be realized, the Corps' threshold jurisdiction to evaluate proposed activities that might threaten those values must be interpreted broadly. The determination whether particular wetlands should be subject to restrictions on development by virtue of Section 404 rationally can occur only after the Corps has been given the opportunity to make case-specific evaluations. A narrow jurisdictional threshold such as that adopted by the court below thus pretermits the regulatory procedure set up by Congress to enhance and maintain water quality. It leaves wetlands that may be critical to the quality of the traditional waters to which the court below confined its concern wholly outside the regulatory ambit.<sup>31</sup>

Each "adjacent wetland" subject to the Corps' regulatory jurisdiction does not, however, perform ecological functions to the same degree; nor does every pollutant discharge into these areas cause significant downstream impacts. A Corps permit will issue if the proposed activity complies with the guidelines issued under Section 404(b) of the Act, 33 U.S.C. 1344(b), and is otherwise not contrary to the public interest. That determination, of course, can only be made on a case-by-case basis. The degree to which a particular wetland actually performs the functions that Congress sought to promote varies according to localized, complex, interacting factors. See

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<sup>31</sup> A broad test for threshold jurisdiction over adjacent wetlands also is consistent with the Commerce Clause principle that the triviality of an individual's intrastate act is irrelevant so long as the class of such acts might well have a nationally significant effect on interstate commerce. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277; *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942).

*Wetlands* 5, 37, 43. Impacts also depend on the scope and methodology of the project and will vary according to the season of the year. *Id.* at 124-135.

Jurisdictional rules are of only limited utility in accommodating these variations. It is for that reason that site and project-specific considerations are evaluated in the Section 404 permit review process. In issuing Section 404 permits, the Corps must apply environmental guidelines developed by EPA in conjunction with the Corps. See Section 404(b)(1) of the CWA, 33 U.S.C. 1344(b)(1); 40 C.F.R. Pt. 230.<sup>32</sup> EPA's guidelines require the Corps to consider the potential impact of the proposed project upon the physical, chemical, and biological characteristics of the aquatic ecosystem. 40 C.F.R. 230.20-230.61.

The Corps has supplemented EPA's guidelines with its own regulations governing the issuance of all Corps permits. 33 C.F.R. Pt. 320. Under these regulations, the Corps engages in a "public interest balancing process," which takes into account "the national concerns for both the protection and utilization of important resources." 33 C.F.R. 320.1(a). The Corps' "public interest review" is "a dynamic program that varies the weight given to a specific public interest factor in light of the importance of other such factors in a particular situation." *Ibid.*

With respect to wetlands in particular, the Corps evaluates seven criteria to determine whether a given

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<sup>32</sup> The guidelines state that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (40 C.F.R. 230.10(a)). In addition, if the proposed discharge is to occur in a wetland (a "special aquatic site") and the proposal is not "water dependent"—i.e., it does not require siting within or access to the "special aquatic site" to fulfill its purpose—practicable alternatives are presumed available unless otherwise specifically shown. 40 C.F.R. 230.10(a)(3). This presumption imposes an evidentiary burden on an applicant, but it does not bar issuance of a permit if a proper showing is made.

wetland "perform[s] functions important to the public interest." 33 C.F.R. 320.4(b) (2).<sup>33</sup> If a given wetland is identified as "important" under these criteria, then the Corps still must weigh the benefits of the project against the damage to the wetland resources. 33 C.F.R. 320.4(b) (4). Conversely, if a given wetland has relatively little value under these criteria, the public interest weighs more heavily in favor of issuance of the permit.

It also is significant that the permit review process is not intended to result in an "all-or-nothing" decision. For example, the Corps may determine that a permit should issue, but that it should be conditioned to reduce adverse consequences of the proposal. Adverse effects from the discharge of pollutants into the aquatic environment can be minimized by selecting sites that are of relatively low ecological value or by employing "best management practices" (see 40 C.F.R. 230.70-230.77; 33 C.F.R. 330.6) or other measures to mitigate adverse effects on water resources, including wetlands.<sup>34</sup>

A broad test for threshold jurisdiction, therefore, allows the permit review process to go forward, thereby preventing the unnecessary pollution or destruction of wetlands important to the maintenance of water quality. The court of appeals' unduly narrow approach to the threshold jurisdictional issue prevents the Corps from undertaking the review intended by Congress and will

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<sup>33</sup> A particular wetland performs functions important to the public interest when it (1) serves important natural biological functions, (2) is set aside for study or as a refuge (3) is valuable for natural drainage, (4) is significant in shielding other areas from erosion, (5) is valuable for water storage, (6) is a prime natural recharge area for other connected waters, or (7) serves to purify other waters.

<sup>34</sup> On average, more than one-third of all Section 404 permits that are granted contain conditions requiring best management practices or other mitigation measures. *Wetlands* 12.

inevitably lead to water pollution and destruction of wetlands that would not otherwise occur.<sup>35</sup>

2. The Corps' regulations further promote the purposes of the CWA by establishing a jurisdictional test that can be readily applied by landowners and regulators alike. The Corps' use of vegetation as a primary indicator of the shoreward extent of its jurisdiction typically permits relatively easy identification by visual inspection of areas subject to Section 404 jurisdiction. The advantages of this approach were noted by Senator Baker during the 1977 debate on the proposed amendment to restrict the geographic reach of Section 404 (123 Cong. Rec. 26718 (1977)):

[T]he old jurisdictional mean high water line in our coastal waters was costly to establish and excluded one-half to one-third of most coastal marshes.

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Today this problem has been eliminated. The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas. One Florida developer informed us that with the new approach, the location of coastal marshes is less time consuming and less expensive. No longer is it necessary to expend thousands of dollars for tide experts and surveyors to establish the exact mean high water mark as required by the old corps program.

The court of appeals' jurisdictional test, which is essentially a throwback to the unduly complicated determination required when the mean or ordinary high water mark was employed as the shoreward limit of jurisdiction, undermines effective implementation of the Section

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<sup>35</sup> Indeed, the Corps has estimated that the court of appeals' "frequent flooding" test will release 2,128,000 acres of wetlands within the Sixth Circuit from the protection of the Clean Water Act; this acreage amounts to 48% of the wetlands previously thought to be within the Corps' jurisdiction within the Sixth Circuit.

404 program. In contrast to the relative ease with which the jurisdictional test set forth in the Corps' regulations can be applied to particular parcels of land, the court of appeals' "frequent flooding" test is dependent upon highly technical, hydrologic data not readily accessible to landowners or regulators. As a practical matter, it would be difficult for landowners to isolate the inundation required by the court's decision from other factors affecting the wetness of an area. The presence of saturated soil and wetland vegetation is, however, relatively easy to detect. Approximately 11,000 Section 404 permit applications are processed annually by 38 Corps district offices. *Wetlands* 12. Due to the magnitude of the program and its decentralized administration, effective implementation of Section 404 is highly dependent on voluntary compliance by landowners, which in turn requires a clear, easily-applied jurisdictional test. In effect, the court of appeals' decision requires a potential permit applicant to hire hydrologists to assess the existence, the frequency, and the direction of the flow of water, and then to evaluate its causal relationship to the aquatic vegetation. In these circumstances, public cooperation inevitably will be jeopardized. For the same reasons, the government's ability to enforce Section 404 by detecting violations and advising landowners of permit requirements will be unduly complicated. By contrast, the Corps' regulations are a workable means of readily identifying areas subject to Section 404 jurisdiction, thereby promoting effective implementation of the statutory scheme.

#### **IV. THE SOUTHERN PORTION OF RIVERSIDE'S PROPERTY IS A WETLAND SUBJECT TO SECTION 404 REGULATORY JURISDICTION**

The vegetation and saturated soil conditions that characterize the southern portion of Riverside's property—i.e., the area south and east of a contour line of the elevation of 575.5 feet (International Great Lakes Datum)

(Pet. App. 31a)—bring that area within the Corps' wetlands definition. (The Corps did not assert, nor did the district court find, Section 404 jurisdiction over the northwest portion of the property, some of which had been filled previously without objection (Pet. App. 22a-23a).) It is undisputed that the southern portion of the property supports a "prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c). Expert witnesses identified all of the vegetation on the property as wetland species, and the record demonstrates a total absence of upland species of vegetation. J.A. 33-34, 56-57, 75, 77.<sup>36</sup> As accurately noted by the district court, "[Riverside's] witnesses conceded that there was wetland vegetation" (Pet. App. 23a). See also J.A. 26, 28, 34, 39-40, 59, 72-73, 79.<sup>37</sup>

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<sup>36</sup> The predominant vegetation on the property consists of cattails, marsh grasses, and duckweed, all of which require saturated soil conditions for survival. J.A. 29, 34, 55, 71, 75-76. Thus, the district court, in applying the Corps' 1975 interim regulation, 33 C.F.R. 209.120(d)(2)(h) (1976), concluded that the unfilled, southern portion of the property is "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Pet. App. 23a. Other types of vegetation found on the property (e.g., ash, red maple, pussy willows, cottonwood, and red ozier dogwood) can survive in dry or upland areas, but they can tolerate saturated wetland conditions. J.A. 33-34, 56-57. See also *Classification* 37-41 (listing all of the vegetation found on Riverside's property as wetland plants). The 1977 revision to the Corps' regulations eliminated the words "vegetation that requires saturated soil conditions" (33 C.F.R. 209.120(d)(2)(h) (1976)) and substituted the phrase "vegetation typically adapted for life in saturated soil conditions" (33 C.F.R. 323.2(c)). The revision clarified that wetland species include vegetation that can tolerate, but does not biologically require, saturated soil conditions. See 42 Fed. Reg. 37128 (1977); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 912-913.

<sup>37</sup> The court of appeals declined to overturn any of the district court's factual findings, and thus they should be accepted by this Court. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

It is also clear that the property in question is, "as it exists" now (42 Fed. Reg. 37128 (1977)), saturated at a frequency and duration sufficient to support wetlands vegetation. The Lamson soil found on the property is generally saturated because of its attributes of poor drainage and a high water table (Pet. App. 25a, 37a).<sup>38</sup> The observations of expert witnesses who inspected the property near the time of trial confirmed that there was water on the surface and that the soil was saturated (although there was no evidence suggesting that Lake St. Clair was then at a high enough level to overflow onto the property). J.A. 29, 47-48, 74-75, 77.<sup>39</sup> Moreover, the prevalence of plants that require saturated soil conditions, coupled with the evidence of abundant wetland wildlife such as muskrats and marsh wrens (J.A. 41-42, 55, 66, 67), can only be explained by saturated conditions.

Finally, Riverside's property is an "adjacent" wetland within the meaning of 33 C.F.R. 323.2(d). The property

<sup>38</sup> As noted by the district court (Pet. App. 37a) the "Soil Survey, Macomb County, Michigan," issued by the Soil Conservation Service of the United States Department of Agriculture (DX 28), confirmed that for Lamsom soil, "[t]he water table is at or near the surface much of the year" (J.A. 21); that "water in and or on the soil interferes with plant growth or cultivation" (J.A. 22); that "[a]rtificial drainage is a major management requirement for all uses of this soil" (*ibid.*); and that the soil is "well-suited" for "wetland food and cover plants" and wildlife "that normally frequent such wet areas as ponds, marshes, and swamps" (J.A. 25).

<sup>39</sup> Even Riverside's expert, Mr. Gough, who had the most reservations about classifying the property as a wetland, testified that "at the present time" the southern portion of the property could be classified as a Class 3 wetland (a shallow fresh water marsh) that is usually water-logged during the growing season and often is covered with as much as six inches or more of water (J.A. 110; DX 91). As the surface elevation rises to the north, the property was by Mr. Gough's evaluation a Class 2 wetland (an inland fresh meadows wetland), in which the soil is without standing water during most of the growing season but is waterlogged within a few inches of the surface (J.A. 110-111).

is contiguous to Black Creek, a navigable waterway and tributary of Lake St. Clair. Pet. App. 23a. The district court quite correctly found that the property was contiguous to Black Creek even though a separately owned parcel of land lies between Riverside's property and Black Creek. That parcel also exhibits the wetlands characteristics of aquatic vegetation and saturation, and thus Riverside's property is simply part of a larger, divided-ownership marsh that abuts and borders Black Creek. *Id.* at 23a-24a; J.A. 51-53, 58-60, 64-67.<sup>40</sup>

In sum, the southern portion of Riverside's property is a "wetlands" subject to CWA jurisdiction under the Corps' regulations. The court of appeals' concern (Pet. App. 21a) that the Corps was here attempting to regulate "low lying backyards" was entirely misplaced. Although the wetlands vegetation on Riverside's property is largely attributable to causes other than inundation from Lake St. Clair, it cannot be disputed that the property serves precisely the type of ecological functions that motivated Congress to include wetlands in the Section 404 program. J.A. 41-42, 47, 62-63, 72, 75-76.<sup>41</sup>

<sup>40</sup> As the district court explained (Pet. App. 24a):

In determining whether an area is contiguous, the Court must look at whether the wetland type of vegetation continues to the navigable waters. Any other interpretation would permit a landowner of contiguous and adjacent wetlands to deed a ten-foot strip between the navigable water and his property to some third person and then claim that the wetlands were no longer contiguous or adjacent.

<sup>41</sup> Despite its repeated prior concessions that the property is now characterized by a prevalence of vegetation that requires saturated soil conditions for growth and reproduction, Riverside argued in its reply brief in the court of appeals (at 3, 6) that the property is not a wetland "under normal circumstances". (33 C.F.R. 323.2(c)). Riverside contended that the property was dry farmland from the early 1900s until the 1950s and that the property only became "wet" thereafter because of governmental activities

in the area that altered the drainage capabilities of the property. Riverside's arguments are off the mark.

First, there was conflicting evidence concerning the past use of the property for farming. See J.A. 31, 52, 64-67, 87, 95-97. But the use or condition of the property so long ago is legally irrelevant in view of the Corps' stated intent to regulate property "as it exists and not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (1977). Moreover, the implicit assumption that agricultural use proves that the property was dry or upland is erroneous. Wetlands and agricultural lands are not necessarily exclusive. J.A. 17, 36-37, 59-60. See generally Classification 3; *Wetlands* 87. Congress's amendment of Section 404 to exempt certain agricultural and silvicultural activities, such as plowing, seeding, cultivating, minor drainage, and harvesting, 33 U.S.C. 1344(f)(1), evidences its understanding of this fact.

Second, the governmental activities of which Riverside complained are both overstated and irrelevant. The activities occurred in response to flooding from Lake St. Clair in 1973. In that year, the Macomb County Road Commission filled a drainage ditch along Jefferson Avenue, which abuts the eastern boundary of Riverside's property (J.A. 100, 118). Also in 1973, the Corps provided technical and financial support to help the local township build a dike across the northwest portion of Riverside's property to protect inland areas from flooding. The dike (which was opened in 1975) was farther inland from the wetlands area in question, so any flood waters from Black Creek or Lake St. Clair would have reached the property at issue whether or not the dike had been built. See 1/21/77 Tr. 57-64; J.A. 118. Nevertheless, Riverside charged that these activities caused the property to become unnaturally wet. See Br. in Opp. 6-7. In addition to the fact that this conclusion was pure supposition, it was contradicted by evidence that the property exhibited the characteristics of wetlands many years prior to these events. J.A. 52-53, 56, 58-60, 64-67, 69-71. Finally, if there were merit to Riverside's contention that governmental activities had converted its property into a wetland, its only conceivable remedy would be an inverse condemnation action. No such action has ever been brought against the United States, although we are advised that Riverside has sued the local authorities responsible for the installation and operation of a pump south of Riverside's property that allegedly causes the property to be wetter than would otherwise be the case. Regardless of the outcome of that litigation, the property clearly remains a wetland subject to federal jurisdiction.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ALEXANDER C. STEVENS  
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In the Supreme Court  
OF THE  
**United States**

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,  
*Petitioner.*

v.

RIVERSIDE BAYVIEW HOMES, INC., et al.,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

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**RESPONDENT'S BRIEF**

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## **QUESTION PRESENTED**

Whether low-lying, poorly-drained land owned by Riverside, hydrologically unrelated to any lake, river, or stream, is a "navigable water" within the meaning of section 502(7) of the Clean Water Act, codified at 33 U.S.C. § 1362(7), thereby subjecting the placement of fill on that land to U.S. Army Corps of Engineers regulatory jurisdiction.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc.

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No. 84-701

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On Writ of Certiorari to the United States  
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**RESPONDENT'S BRIEF**

**STATEMENT**

1. Riverside Bayview Homes, Inc. (hereafter "Riverside") confronts in this case the worst of the regulatory excesses of the U.S. Army Corps of Engineers (hereafter "Corps") in its administration of the Clean Water Act of 1972, 33 U.S.C. section 1251, et seq. (hereafter "CWA").<sup>1</sup> The precise issue is whether the CWA, an act that by its terms is limited to controlling the

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<sup>1</sup> The Federal Water Pollution Control Act was substantially amended in 1972. 33 U.S.C. § 1251, et seq. The 1972 amendments established the present format of the act. Additional amendments occurred in 1977, but did not alter the jurisdictional reach of the CWA. The popular name of the act was also changed in 1977 to the "Clean Water Act." We shall refer to both the 1972 and 1977 versions under its present common name—the Clean Water Act ("CWA").

discharge of pollutants into "navigable waters,"<sup>2</sup> authorizes the Corps, under section 404 of the act, 33 U.S.C. section 1344, to control the use of land that, although wet, is not a part of or influenced by any waterbody.<sup>3</sup> The court of appeals correctly held that the Corps' assertion of jurisdiction over land owned by Riverside, on the basis that it is a "navigable water," was unauthorized by either the CWA or the Corps' own regulations because the property is not a part of or connected to any waterbody. Pet. App. 10-12a.<sup>4</sup>

The government urges reversal of the court of appeals on the ground that Riverside's lands are "wetlands" and are to be included within the jurisdictional reach of the CWA as "navigable waters" within the meaning of 33 U.S.C. section 1362(7). In asserting jurisdiction under the CWA over "wetlands," the government fails to recognize that "wetlands" occupy a wide spectrum of land conditions, ranging from permanently submerged marshes that are a part of a waterbody to low-lying inland areas possessing poor drainage that become seasonally wet only during periods of high precipitation.<sup>5</sup> By its claim, the government effectively asserts jurisdiction over millions of acres of lands

<sup>2</sup> The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7).

<sup>3</sup> Although principal regulatory authority under the CWA rests in the Environmental Protection Agency, the regulation of the placement of dredged or fill materials in "navigable waters" is vested in the Corps under section 404 of the act.

<sup>4</sup> Appendix to United States Petition for Writ of Certiorari (hereafter "Pet. App.").

<sup>5</sup> See Office of Technology Assessment, Congress of the United States, *Wetlands, Their Use and Regulation*, Doc. No. OTA-9-206 at 28, 87-92 (1984) (hereafter *OTA Wetlands*); Fish and Wildlife Service, U.S. Dept. of Interior, *Classification of Wetlands and Deepwater Habitats of the United States* at 3 (1979) (hereafter *Classification of Wetlands*); Fish and Wildlife Service, U.S. Dept. of Interior, *Wetlands of the United States: Current Status and Recent Trends* at 28-29 (1984) (hereafter *National Wetlands Inventory*); Fish and Wildlife Service,

throughout the United States that, like the property owned by Riverside, possess poor drainage or a high groundwater table but are hydrologically unrelated to any body of water.<sup>6</sup>

The court of appeals found such a construction of the CWA and the Corps' regulations unreasonable and unsupported by the language of the act. In so doing, that court concluded that the CWA was not intended by Congress to regulate land areas that are not a part of or frequently inundated by a "navigable water." In this regard, the court's decision properly distinguishes between those areas that are a part of "navigable waters" and those that are not related to a waterbody of any sort.

2. In 1952, George Short began to purchase lots in Harrison Township, Michigan, a suburb northeast of Detroit, for the purpose of consolidating the area for one development. Over time, Mr. Short acquired a total of 80 acres. In 1960, when more investment was needed, the Riverside Corporation was formed (deriving its name from the platted subdivision in which the properties are located—"Riverside Bay Gardens"), and the property was transferred to that entity as its sole asset. 6th Cir. App. 126-127.<sup>7</sup>

The land lies approximately one mile west of Lake St. Clair and south of South River Road, a raised roadbed that roughly parallels the Clinton River to the north. Pet. App. 2a. A number of housing subdivisions are located between Riverside's property and Lake St. Clair. Pet. App. 35a. The western boundary of the property is formed by Jefferson Avenue, a heavily travelled thoroughfare separating the land from urbanized areas to the west. Between the southern boundary of the property and the man-made Savan Drain are two privately owned 10-acre parcels.

U.S. Dept. of Interior, *Wetlands of the United States*, Circular 39 at 14-17 (1971) (hereafter *Circular 39*).

<sup>6</sup> See generally *Classification of Wetlands; National Wetlands Inventory*; *Circular 39*; U.S. Army Corps of Engineers, Dept. of the Army, *Wetlands Delineation Manual*, Doc. No. Y-84- (1985 Draft) (hereafter *Wetlands Delineation Manual*).

<sup>7</sup> Appendix submitted to the Sixth Circuit Court of Appeals by the United States (hereafter "6th Cir. App.")

Pet. App. 2a. To the south of the Savan Drain is the Metropolitan Parkway and a large development known as Metropolitan Beach which was constructed through extensive dredging and filling. Riverside App. 8a-10a;<sup>8</sup> Exh. 55. The property is ringed on all four sides by paved public streets and fully developed urban areas. Pet. App. 2a-3a, 19a; Exh. 22, 55; 6th Cir. App. 76.

From the early 1900s until at least 1955, the Riverside land, together with much of the surrounding area, was actively farmed. 6th Cir. App. 166-167; Exh. 25, 26, 27. Those portions of the land on which crops were not grown were heavily wooded by oak and maple trees that are still in existence today. Riverside App. 3a-7a. The Lamson soil that underlies the property possesses a high seasonal water table, drains poorly, and has limited permeability. Riverside App. 11a-13a; J.A. 21.<sup>9</sup> Soil conditions of this type are typical of this part of Michigan.

The Riverside land consists of a 60-acre parcel and an adjoining 20-acre parcel located to the north and east. Pet. App. 22a. The 60-acre parcel was originally platted as the "Riverside Bayview Gardens" subdivision in 1916 under a Michigan statute requiring a finding that the property was suitable for residential development. Pet. App. 22a; Exh. 24; Mich. Comp. Laws Ann. 3350.1 (1915). Development of the property commenced in 1916 with the paving of sidewalks. Pet. App. 22a. A 1929 map of the area shows that no portion of the property displayed "wetland" characteristics at that time. Exh. 21.

With the acquisition of the land by George Short in the 1950s, the development of the subdivision continued. In the 1950s and 1970s, sewer lines and fire hydrants were installed. Riverside App. 1a-2a; J.A. 84-85. The anticipated development of the land was also factored into the design of the sewer trunk lines serving the area. 6th Cir. App. 187. Two obstacles hindered full implementation of Riverside's development plans. First, objections from an

adjoining property owner prevented an existing road that bisected the 60-acre tract from being formally vacated. Second, a local governmental agency imposed minimum lot elevations that required filling of the site. This fill did not become available until 1976. Pet. App. 3a; 6th Cir. App. 129-130.

In 1973, Lake St. Clair rose to levels unprecedented since water-stage data was first recorded in 1897. Pet. App. 29a. Homes and businesses near Riverside's property were flooded for the only time in memory. Pet. App. 30a. The Corps, in concert with various local agencies, took emergency action to prevent further flooding. One of the flood control measures was the Corps' construction of a large dike designed to protect surrounding lands from inundation. Despite objections from Riverside, the Corps refused to place the dike in a location that would also protect Riverside's property. 6th Cir. App. 133. In fact, the dike's location, together with the other preventative measures, impeded the property's natural drainage and directed surface water from neighboring areas onto Riverside's land.<sup>10</sup> Pet. App. 3a; J.A. 97, 100-101; 6th Cir. App. 177-180. Although the lake waters receded, the flood control measures were left intact and have had the continuing effect of diverting drainage water onto the property and altering the land's ability to drain.<sup>11</sup> Pet. App. 3a.

When a source of fill became available in September 1976, Riverside undertook discussions with the Corps to determine

<sup>8</sup> Portions of the trial transcript referred to herein are included in an appendix to this brief and hereafter referred to as "Riverside App."

<sup>9</sup> Joint Appendix on Writ of Certiorari to the Sixth Circuit Court of Appeals (hereafter "J.A.").

<sup>10</sup> A drainage ditch along Jefferson Avenue, designed to divert surface runoff from subdivisions to the west, was filled in, directing the runoff onto the Riverside property. In a similar fashion, a pumping station was constructed southwest of Riverside's land for the purpose of lifting water from the west side of Jefferson Ave. to the Savan Drain south of the Riverside land. This water did not simply confine itself to the drain, but spread across the Riverside property. As a part of its program, the Corps constructed what is known as the "Operation Foresight" dike through Riverside's land. A pump installed on the dike by the Corps pumped yet more water onto Riverside's land. 6th Cir. App. 177-178.

<sup>11</sup> The only effort to return Riveride's property to its former condition was to breach the dike in one place. 6th Cir. App. 179-180.

whether a permit was required under regulations recently promulgated by that agency. Pet. App. 3a; 6th Cir. App. 146-147, 158. Those regulations were the "interim final regulations," published on July 25, 1975, in which the Corps defined "navigable waters" subject to fill permit requirements to include "freshwater wetlands including marshes, shallows, swamps and similar areas that are *contiguous* or *adjacent* to other navigable waters and that support freshwater vegetation." 40 Fed. Reg. 31324 (1975) (emphasis added). "Freshwater wetlands" in turn were defined as:

Those areas that are *periodically inundated* and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction . . .

40 Fed. Reg. 31324-31325 (1975) (codified at 33 C.F.R. § 209.120[d][2][h]) (emphasis added). With the exception of a portion of Riverside's land along the north boundary designated as being clear of Corps jurisdiction, uncertainty and confusion existed as to what area the Corps claimed was subject to its permit requirements. 6th Cir. App. 154-158, 162. Nonetheless, Riverside filed a permit application on November 15, 1976. Pet. App. 3a.

Riverside also sought and obtained a fill permit from Harrison Township. When, by December 1976, Riverside had not commenced filling, the township formally notified the company that its land constituted a nuisance under the terms of the applicable local zoning ordinance and that, unless Riverside filled the property, it stood to sustain substantial fines. J.A. 87-88. Filling commenced immediately.

3. The Corps instituted enforcement proceedings against Riverside on December 22, 1976, through issuance of a cease and desist order prohibiting further filling of the site. Pet. App. 4a. When filling continued, the Corps brought this enforcement proceeding on January 7, 1977. Pet. App. 4a. As of that date, the only investigation conducted by the Corps was a quick fly-by in an airplane and a five-minute visit to the site by one botanist who took no samples and could not identify any particular plant species observed while at the site. J.A. 29-30.

The government immediately sought a preliminary injunction. A hearing on that motion proceeded in January 1977 under the July 25, 1975 Corps regulations. Pet. App. 22a. The district court (Judge Cornelia G. Kennedy) found that the property in its present condition was characterized by a prevalence of vegetation that required saturated soil conditions for growth and reproduction, but that the reason for the prevalence of this wetland-type vegetation was the poor drainage characteristics of the Lamson soil that underlay the property, and not the land's proximity to any waterbody.<sup>12</sup> Pet. App. 23a-25a. The judge concluded that the evidence established that there was no hydrologic connection between the property and any nearby waterbody.<sup>13</sup> Pet. App. 25a.

Since the 1975 Corps regulations required a finding of "periodic inundation," Judge Kennedy focused on that element. She found that the property had been inundated (i.e. flooded) four to six times in the last 80 years during periods of extreme high water on Lake St. Clair, the most recent occurring during the unprecedented high waters of 1973-74.<sup>14</sup> Judge Kennedy admittedly struggled with the meaning of "periodic" as used in the regulations. The government claimed that the requirement of "periodic inundation" was related to the purported necessity of preserving wetland areas. Judge Kennedy pointed out, however, that if the

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<sup>12</sup> The evidence established that the Lamson soil was such that water from any adjoining lake, river, or canal could not permeate the soil beyond a 50- to 100-foot distance. These conclusions are supported by the United States Department of Agriculture 1971 Soil Survey of Macomb County, Michigan, Exh. 28, and the testimony of the author of that report, Thomas P. Gough. Pet. App. 34a.

<sup>13</sup> Curiously, Judge Kennedy concluded that the land was "contiguous" (as that term is used in the regulations) to Black Creek. However, Black Creek is nowhere near the property, being located far to the east. Exh. 55. While the Savan Drain ultimately flows into the creek, their confluence is some distance away. The Savan Drain, moreover, at its closest point, is located approximately 200 feet southeast of the Riverside property. Pet. App. 23a-24a; Exh. 24.

<sup>14</sup> Other high water occurrences were 1928, 1952-53 and 1969. Pet. App. 30a. Judge Kennedy equated the term "inundated" with "flooding." Pet. App. 26a.

government were correct in viewing the CWA as a wetland preservation device, the regulations also would have prohibited draining wetland areas, which they did not. Pet. App. 30a. Admitting that her decision was "difficult and perhaps somewhat arbitrary," Judge Kennedy nonetheless concluded that six inundations over 80 years was "periodic" and thus the land fell within the Corps' jurisdiction. Judge Kennedy thereupon issued a preliminary injunction restraining filling in any area below a contour line at elevation 575.5 feet above mean sea level absent a Corps permit.<sup>15</sup>

Two years later, in February 1979, when the matter came on for a trial on the merits, the principal focus was whether there existed a hydrologic connection between the property and any navigable water. Based upon evidence taken during the preliminary injunction phase, together with additional facts produced at the trial, Judge Kennedy reinforced her initial finding that "the waters of Clinton River, Black River [sic] and Lake St. Clair do not contribute and 'have not contributed to the wetland-type vegetation on defendant's property' except for the periodic inundation [four to six inundations over 80 years]." Pet. App. 37a. In spite of that finding, Judge Kennedy made her preliminary injunction permanent. Pet. App. 27a.<sup>16</sup>

Following an initial appeal of the district court's ruling, the court of appeals remanded the action for reconsideration in light of new regulations adopted by the Corps on July 19, 1977. Pet.

<sup>15</sup> Judge Kennedy selected the elevation of 575.5 feet above mean sea level as being the extent of Corps jurisdiction. That was the elevation below which *four* of the six inundations had occurred during 80 years, plus an additional one-half foot that Judge Kennedy allowed to accommodate normal monthly fluctuations above the mean. Pet. App. 30a-31a.

<sup>16</sup> Judge Kennedy also declared unconstitutional the then-existing Corps regulation—42 Fed. Reg. 37159 (1977) (codified at 33 C.F.R. § 326.4[e])—that prohibited the district engineer from processing a permit application while enforcement proceedings were pending against an applicant. Pet. App. 37a-41a.

App. 42a. The 1977 regulations revised the definition of "navigable waters" to be used for section 404 purposes. 42 Fed. Reg. 37122 (1977) (amending 33 C.F.R. § 323.1). Under the 1977 regulations, "navigable waters" include (with respect to inland wetlands) wetlands "adjacent" to lakes, rivers and streams that are navigable waters of the United States or interstate waters and their tributaries. Other waters, such as isolated wetlands, are included only if their degradation or destruction could affect interstate commerce. 42 Fed. Reg. 37144 (1977). The new "wetland" definition includes: "[A]reas that are *inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 42 Fed. Reg. 37128 (1977) (codified at 33 C.F.R. § 323.2) (emphasis added).

On remand to the district court, the government presented no new evidence. Judge Horace W. Gilmore determined that the Corps' new definition of navigable waters was "broader than its predecessor." Pet. App. 43a. Adopting the facts as found by Judge Kennedy, he concluded that the new regulations had no effect on Judge Kennedy's earlier ruling. Pet. App. 43a-44a. An appeal by Riverside to the Sixth Circuit Court of Appeals followed.

On March 7, 1984, the court of appeals reversed, holding that Riverside's land was neither a "wetland" nor a "navigable water" as defined by the Corps and thus was not subject to the Corps' section 404 regulatory jurisdiction. The court of appeals, in construing the CWA and the 1977 regulations to avoid the Fifth Amendment taking implications raised by the Corps' assertion of unbounded jurisdiction, concluded that for a "wetland" to be treated as "navigable waters," it must exist because of inundation or flooding from navigable waters at a frequency sufficient to cause the wetland vegetation. The mere presence of wetland vegetation resulting from some other cause (such as poor drainage), the court noted, is not sufficient. Pet. App. 10a. Were this not so, the court reasoned, areas that "inexplicably support some species of aquatic vegetation, but that are not normally inundated" would fall within the wetlands definition. Pet. App. 11a.

Under such circumstances, the Corps would be asserting jurisdiction over areas that were not truly aquatic and this, the court held, was not the intent of the regulations or the CWA. Pet. App. 11a. In view of the fact that the district court had found that there had been only four to six occasions of inundation over the 80 years of record-keeping and that the wetland vegetation growing on Riverside's property was not the result of inundation from, or any hydrologic connection to, any nearby waterbody, the court of appeals held that the Corps had improperly asserted jurisdiction under its regulations. The court thus reversed the judgment of the district court and vacated the injunction. Pet. App. 12a.

The government's motion for reconsideration and a hearing *en banc* was denied on June 8, 1984. Pet. App. 20a. In its order denying the petition, the court of appeals elaborated upon its initial decision by pointing out that were the government's position to be adopted, any low-lying land where water sometimes stands and where vegetation requiring moist soil conditions grows would be converted into "navigable waters" under the CWA "without regard to either their proximity to navigable waters . . . or the inundation of such lands by navigable waters." Pet. App. 20a-21a. The court found that interpretation inconsistent with the CWA.

During the pendency of the appellate proceedings, the Corps finally acted on Riverside's application to fill 30.6 acres of the property by denying the permit. Riverside's inability to obtain a permit to fill its lands has frustrated its effort to use the property for any economically productive purpose, and the property remains vacant and unused today.

#### **SUMMARY OF ARGUMENT**

1. a. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To achieve this goal, the act prohibits the discharge of pollutants from a point source into "navigable waters" except under permit. The Corps is authorized to regulate the "discharge of dredged or fill material" into "navigable waters" under section 404 of the act. 33 U.S.C. § 1344. Nothing in the act

authorizes the Corps to regulate "wetlands," except to the extent that a particular wetland is a part of a "navigable water" as that term is defined in the act.

The Corps has taken an act designed to control the pollution of "navigable waters" and, by regulation, has tried to transform it into the equivalent of a national wetlands preservation scheme. Through regulations promulgated in 1975 and 1977 the Corps brought within the reach of the CWA low-lying land areas that possess poor drainage or a seasonally high water table, but that are not connected in any fashion to a waterbody. The Corps construes its jurisdiction to go so far as to cover areas possessing wet soils for as little as five percent of the growing season and supporting trees and other vegetation merely tolerant of wet soils for a period of time. It is inconceivable that Congress intended to extend the reach of the CWA to lands of this sort when neither the term "wetlands" nor its equivalent ever appears in the text of the 1972 amendments to the CWA or the legislative history.

Here, the Corps claims that the land owned by Riverside is a "navigable water." The facts disclose, however, that the property in its natural condition had been farmed for close to 60 years. Moreover, it is a part of a platted subdivision in which site improvements such as sidewalks, sewers, and fire hydrants were constructed as early as 1916, is currently forested by oak and maple trees, and, most significantly, is neither connected to nor hydrologically a part of any waterbody.

The court of appeals correctly held that nothing in the CWA nor the Corps' regulations supports the classification of Riverside's land as "navigable waters" subject to regulation by the Corps. The court based its conclusion upon its analysis of the objectives of the CWA and the obvious meaning of the phrase "navigable waters" as used in the act.

- b. Prior to 1972, there were two programs regulating water pollution. The first was the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq., through which the Corps regulated dredging and filling and the discharge of pollutants into navigable waters of the United States and their tributaries. The Corps, by regulation, adopted a limited view of those waters subject to the Rivers and

Harbors Act and improperly excluded non-navigable portions of otherwise navigable waters and tributaries. The second program through which water pollution was regulated was the predecessor of the present CWA. As adopted, however, the original CWA regulated only the polluting of "interstate" waters, construed under that act as those navigable waters that cross state lines. Thus, many significant waterbodies were improperly omitted from pollution protection.

The 1972 amendments to the CWA sought to correct this deficiency by defining those waters to be regulated by the CWA as "waters of the United States." 33 U.S.C. § 1362(7). The purpose of defining waters in this manner was to bring within the regulatory jurisdiction of the CWA, not only those "navigable waters of the United States" that had been regulated, but also non-navigable portions of those waters, non-navigable tributaries, and waters that did not cross a state line which should have been regulated under the Refuse Act and the CWA, under then-existing case law defining "navigable waters." Also, the traditional boundary of "navigable waters of the United States" that had been used by various regulatory agencies (that is, the mean high watermark on tidal waters and the ordinary high watermark on inland waters) was not to be employed as a limit to jurisdiction under the CWA.

Thus, all areas covered by the waters of a navigable waterbody are to be subject to regulation under the CWA, including wetlands that are regularly inundated by those waters. On the other hand, land areas merely possessing wet soils, not caused by regular inundation (such as poor drainage), are not within the jurisdiction of the CWA. Riverside's land falls into this latter category.

c. "There is no single, correct, indisputable, ecologically sound definition for wetlands . . ."<sup>17</sup> Wetlands include a broad spectrum of lands ranging from those areas that are perpetually inundated by a tidal waterbody, lake or stream to land areas that become wet for as little as five percent of the growing season and that support trees and other plants merely tolerant of moist soil

<sup>17</sup> Classification of Wetlands at 3.

conditions. As much as 100 million acres of land in the United States (excluding Alaska), much of which is either prime agricultural land or land that is suitable for other productive purposes, fall within this definition of "wetlands."

The government admits that its purpose in asserting jurisdiction over wetlands is to prevent the conversion of such areas to any other use. This is not pollution control—it is land use planning. Land use decisions have historically been left to the states under the police power. Certainly Congress did not, through enactment of the CWA, mean to usurp this traditional state function and the Corps should not be allowed to do so now through the promulgation of expansive regulations.

Not only did Congress intend to leave matters such as wetland regulation to the states, but the states in general, and Michigan in particular, have comprehensive regulatory schemes controlling the use of wetland areas. Thus, there is neither a legal basis nor a compelling need for the Corps to assume for itself the role of the nation's wetland protector.

2. a. The government requests reversal of the court of appeals decision, arguing that this Court should defer to the Corps in its interpretation and implementation of section 404 of the CWA. This is akin to placing the fox in the chicken coop. The Corps' administration of its responsibilities under section 404 has been marked by consistent failure to follow its congressional mandate and widespread abuse of its authority. Where, as here, there has been no express congressional delegation, and the agency has failed to act in a consistent or reasonable fashion, vacillating from one regulatory extreme to the other, this Court has consistently refused to defer to agency interpretations of an act. *S.E.C. v. Sloan*, 436 U.S. 103, 117-118 (1978); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973).

The Corps has changed its definition of "navigable waters" on at least six different occasions since 1972.<sup>18</sup> The definitions have

<sup>18</sup> See 38 Fed. Reg. 12218 (1973); 39 Fed. Reg. 12119 (1974); 40 Fed. Reg. 19766 (1975); 40 Fed. Reg. 31320 (1975); 42 Fed. Reg. 37122 (1977); 47 Fed. Reg. 31794 (1982).

ranged from one (the 1974 version) that by all accounts fell far short of the intended reach of the CWA to the 1975 and 1977 versions that, as interpreted by the Corps here, expand "navigable waters" far beyond the wording of the CWA or any manifested intent of Congress. To defer to the Corps here would be to short-circuit the entire legislative process and vest in the Corps unrestricted authority to define its own jurisdiction.

b. The court of appeals correctly concluded that the CWA, by its explicit terms, does not embrace Riverside's land because its soils are wet for reasons wholly unrelated to frequent inundation from an adjacent water of the United States. Pet. App. 9a-12a. The decision of the court of appeals is reinforced not only by wording of the CWA and its legislative history, but also by regulations proposed by the Corps in 1983 in response to findings of the Presidential Task Force on Regulatory Relief. These more recently promulgated regulations are described by the Corps as being a "clarification" of the limits of its jurisdiction in wetland areas as established by its 1975 and 1977 regulations. 48 Fed. Reg. 21466 (1983). Thus, for a "wetland" to be classified as a "navigable water," and therefore subject to the Corps' jurisdiction under the CWA, the area must possess a "perceptible [sic] . . . hydrologic connection" to a "bordering, contiguous, or immediately neighboring" water of the United States. 48 Fed. Reg. 21474 (1983). Although this proposed regulation has not been made final by the Corps and is undoubtedly in excess of its authority, it does at least serve to clarify ambiguities in the 1975 and 1977 regulations relative to the necessity of frequent inundation.

c. The Corps' implementation of its obligations under section 404 has been uniformly criticized by Congress. This criticism led to amendments to the CWA in 1977 that exempted from the act certain activities.

Left unchanged was the original definition of "navigable waters." Congress' failure to adopt proposed amendments to the CWA that would have redefined the Corps' jurisdictional boundaries in terms equivalent to those employed in water pollution measures *prior to* the 1972 amendments to the CWA cannot be interpreted, as the government wishes, as a congressional affirmation of the Corps' unauthorized effort to expand its CWA

jurisdiction beyond that which Congress intended in 1972. *Federal Trade Com. v. Dean Foods Co.*, 384 U.S. 597 (1966). To give any such weight to inaction of Congress has been consistently rejected by this Court, for it is to engage in speculation of the highest sort. *Helvering v. Hallock*, 309 U.S. 106 (1940). The government's argument belies its own speculative nature, for it asks this Court to give greater weight to congressional *inaction* occurring five years after the adoption of the CWA than to the express wording and legislative history of the act as adopted. The government's tortured concept of statutory construction should be rejected by this Court.

d. Contrary to the claim of the government, those lower court decisions that have considered the extent of the CWA's jurisdiction in "wetland" areas have, with two exceptions, involved areas that were frequently inundated by an adjoining water of the United States. The two exceptions are this case and one comparable to it, *United States v. City of Ft. Pierre*, 747 F.2d 464 (8th Cir. 1984). In both instances, the court of appeals concluded that low-lying inland areas not subject to regular inundation by a bordering navigable water of the United States are not subject to regulation under the CWA.

3. Congress did not intend to regulate wetlands under the CWA, except to the extent that they are a part of "navigable waters." Congress accordingly did not establish criteria or guidelines by which the Corps can determine whether or not a so-called "wetland" is to fall within the reach of the CWA. Congress did not intend to delegate wetland regulation to the Corps, leaving to the agency the duty to fill in the details. Rather, the fact that Congress established no criteria is clear evidence that it did not intend to regulate these areas at all. Were this not the case, an attempted delegation of the sort the government claims exists here would be an invalid and unconstitutional delegation of legislative authority. See *Industrial Union v. American Petrol. Inst.*, 448 U.S. 607, 673-674, 685-687 (1980) (Rehnquist concurring).

4. The court of appeals accurately perceived that application of the Corps' 1977 wetland regulations to Riverside would "prohibit any development or change of such property" and thus

"raises a serious taking problem under the fifth amendment." Pet. App. 14a. The court wisely avoided this regulatory taking by construing the 1977 wetland regulations narrowly so as to exclude Riverside's property from the definition of "navigable waters." This conclusion is eminently reasonable and conforms to the doctrine that where a statute is susceptible to more than one interpretation, that construction that will result in a taking of private property should be avoided. *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

## ARGUMENT

### I

#### **THE CWA REGULATES ONLY THE DISCHARGE OF POLLUTANTS AND FILL INTO "NAVIGABLE WATERS." BY THIS TERM, CONGRESS INTENDED TO INCLUDE NAVIGABLE WATERS OF THE UNITED STATES, NON-NAVIGABLE PORTIONS OF THOSE WATERS AND TRIBUTARIES. CONGRESS DID NOT INTEND TO BRING WITHIN THE REACH OF THE CWA LAND AREAS POSSESSING WET SOIL CONDITIONS THAT ARE NOT CONNECTED TO A "NAVIGABLE WATER."**

The extent to which Congress intended to regulate "navigable waters" through adoption of the 1972 amendments to the CWA is best understood when that act and its legislative history are viewed upon the backdrop of prior federal efforts to control water pollution. The federal government's power to regulate waters for the purpose of pollution control stems from the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865). Waters that are navigable in fact and used, or susceptible of being used, in their ordinary condition, as highways for commerce, are subject to regulation by the federal government and are classified as "navigable waters of the United States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Over the years this Court has held that navigable waters of the United States subject to regulation under

the Commerce Clause include, in addition to those that are navigable in fact, those that may be made so with reasonable improvement, non-navigable portions of otherwise navigable waterbodies, and non-navigable tributaries of navigable waters. See *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1941).

Use of Commerce Clause powers to regulate dredging, filling and pollution of navigable waters of the United States was first effected through the Rivers and Harbors Act of 1899. Under section 9 and 10 of this act, the Corps regulated the construction of dams, bridges, structures, and dredging and filling. 33 U.S.C. §§ 401, 403. Under section 13 (referred to as the Refuse Act), it regulated the deposit of any refuse material into navigable waters of the United States or any tributary thereof.<sup>19</sup> 33 U.S.C. § 407.

However, the Corps, in its administration of the Rivers and Harbors Act and the Refuse Act, had taken a restrictive view of the reach of its jurisdiction. By regulation, it had excluded from regulation non-navigable portions of navigable waters, tributaries and those portions of regulated waterbodies above the mean high waterline (tidal waters) or the ordinary high watermark (non-tidal waters). This view continues today. 33 C.F.R. §§ 322, 329.1-12 (1982).<sup>19a</sup>

In addition to the Rivers and Harbors Act of 1899, pollution was also regulated under the predecessor of the CWA, adopted in 1948. 62 Stat. 1155. However, the original CWA extended pollution protection to only "interstate waters." "Interstate waters" were considered to be "all rivers, lakes, and other waters

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<sup>19</sup> Until approximately 1966, the Corps, in its administration of section 13 of the Rivers and Harbors Act, concerned itself primarily with refuse that affected navigation. However, a broader approach was taken after this Court's decision in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), in which it held that "refuse" included all pollutants.

<sup>19a</sup> See *National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.D.C. 1979); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979).

that flow across, or form a part of, state boundaries." 62 Stat. 1161 (1948). Under this definition, waters that, though navigable, did not cross a state boundary were excluded from pollution protection. Congressional dissatisfaction with the limited geographic reach of this act led to a 1966 amendment that extended its jurisdictional boundaries to include the pollution of any "navigable waters of the United States." 80 Stat. 1246, 1252 (1966). Although this amendment brought jurisdiction of the CWA into line with the Rivers and Harbors Act, a number of significant waterbodies, and portions of those waters, remained unregulated by overly constrained administrative interpretations.

From the outset, the federal government's efforts to control pollution of the nation's waters suffered from a fundamental flaw: the inability to prevent pollutants from being discharged into waters in the first instance. The traditional control strategy had been to enforce pollution control measures only after discovery of pollutants in navigable waters of the United States.<sup>20</sup> This proved ineffective and difficult to administer, and it failed to accomplish the desired result of cleaning the nation's waters. Heightened concern over the quality of the nation's waters led to the 1972 amendments to the CWA which, for the first time, completely revised the underlying approach to water pollution regulation. The main thrust of the 1972 act was to control the discharge of pollutants from their source, before they reach "navigable waters." 33 U.S.C. §§ 1311, 1312, 1342, 1343; 1 Legis. Hist. 758; 2 Legis. Hist. 1429.<sup>21</sup>

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<sup>20</sup> The Federal Water Pollution Control Act was originally enacted by the Act of June 30, 1948, ch. 758, 62 Stat. 1155, and amended by the Acts of July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956 ch. 518, 70 Stat. 498; June 25, 1959, Pub. L. 86-70, 73 Stat. 141; July 12, 1960, Pub. L. 86-624, 74 Stat. 411; July 20, 1961, Pub. L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91-611, 84 Stat. 1818; July 9, 1971, Pub. L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92-137, 86 Stat. 379; and Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47.

<sup>21</sup> Citations to "Legis. Hist." refer to the following four volume publication: Senate Committee on Environment and Public Works, *A*

The congressionally declared goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the elimination of the discharge of pollutants into "navigable waters." 33 U.S.C. § 1251(a). This goal is to be achieved principally through the National Pollution Discharge Elimination System under section 402 of the act, 33 U.S.C. section 1342, by which the Environmental Protection Agency sets discharge standards and regulates the discharge of pollutants into "navigable waters." An exception to the EPA's role under the act is created by section 404, 33 U.S.C. section 1344, which vests in the Corps the authority to regulate the discharge of "dredged or fill material" (classified as a pollutant) into "navigable waters."

Congress in 1972 was concerned that the Corps and agencies charged with the administration of the earlier water pollution control acts had construed those acts in a manner that left many substantial waterbodies free from federal regulation. 1 Legis. Hist. 178, 250-251. These agency interpretations were narrower in scope than the reach of the federal government's Commerce Clause authority over navigable waters as articulated by this Court.<sup>22</sup> Thus Congress, in defining "navigable waters" for purposes of the CWA, sought to liberate the definition from unduly restrictive past interpretations. Nevertheless, Congress understood that its Commerce Clause authority over navigable waters has limits in terms of those waterbodies that can be regulated. The legislative history of section 502(7), 33 U.S.C. § 1362(7), expressed Congress' view that the maximum extent of its ability to regulate waters under the Commerce Clause extends to navigable waters of the United States and non-navigable portions and tributaries of those waters.

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*Legislative History of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977*, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973 and 1978).

<sup>22</sup> See *Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1941); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The waters subject to regulation under the 1972 CWA amendments are "navigable waters," which in turn are defined in a rather circuitous manner in section 502(7), 33 U.S.C. § 1362(7), as "waters of the United States, including the territorial seas." This definition resulted from a Senate-House Conference Committee amendment of the two versions of the act that were passed by the Senate (S. 2770, 92d Cong., 1st Sess. [1971]) and the House (H.R. 11896, 92d Cong., 2d Sess. [1971]). The Senate bill defined "navigable waters" as: "[T]he navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." S. 2770, § 502(h). The House version was similar although simpler than that of the Senate; it omitted any specific reference to portions or tributaries of navigable waters: "[T]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, § 502(7). The Conference Committee retained the simplicity of the House version, but assured that the waters specified in the Senate version would be included by dropping the word "navigable." The conferees' description of their intent in selecting the final wording of the definition of their "navigable waters" is a recapitulation of the discussion originally set forth in the Senate and House Public Works Committee reports describing earlier versions of the definition—versions that uniformly included the term "navigable."<sup>23</sup> Elimination of that term had no greater significance than to assure Congress that the

<sup>23</sup> The definition of navigable waters came from the Senate Committee on Public Works, which described its intent as follows:

The control strategy of the act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters, the implementation of the 1965 act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

See 2 Legis. Hist. 1495 (FWPCA Amendments OF 1971, Senate Committee on Public Works Report Together with Supplemental Views to Accompany S. 2770, Oct. 28, 1971).

CWA would be construed in accordance with the more recent decisions of this Court holding that non-navigable portions of navigable waterbodies and tributaries are subject to regulation under the Commerce Clause. The Senate Report on the Conference confirms this conclusion and provides:

The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

1 Legis. Hist. 178. The House Conferees confirmed that their intention was the same:

*The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from *The Daniel Ball* case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used... with reasonable improvement," as well as those waterways which include sections*

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The phrase that "water moves in hydrologic cycles" is often cited as being reflective of an intent to expand the reach of the CWA beyond "navigable waters of the United States." However, the phrase first appears in the legislative history with reference to S. 2770, which extended only to "navigable waters of the United States."

presently obstructed by falls, rapids, sandbars, currents, floating debris, etc. [Citing among other cases: *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, 416 (1940); and *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).]

\* \* \*

Thus, *this new definition clearly encompasses all waterbodies, including main streams and their tributaries*, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill . . . .

1 Legis. Hist. 250 (Statement of Rep. Dingell) (emphasis added).

Congress' intent could not have been clearer. "Navigable waters" as used in the CWA is to include the navigable waters of the United States, non-navigable portions of those waters and tributaries. "Wet lands," other than those constituting part of the foregoing waterbodies, are not intended to be regulated. In fact, the term "wetlands" appears nowhere in either the 1972 act or its extensive legislative history. It is inconceivable that Congress intended to bring within the rigorous regulatory scheme of the CWA millions of acres of low-lying land that are not a part of or connected to a "navigable water" without once mentioning that category of land in either the act or its legislative history.<sup>24</sup>

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<sup>24</sup> Precise acreage figures of the amount of poorly-drained, inland areas falling within this category are hard to come by. It appears from studies performed by the United States Department of Interior that perhaps as much as 50 million acres of land may fall within this category (excluding Alaska). See *Circular 39* at 15, 18-25; *National Wetlands Inventory* at 28. Figures compiled by the Soil Conservation Service, U.S. Department of Agriculture, show that possibly 100 million acres currently exist in this category of land. American Water Resources Association, *Wetland Functions and Values: The State of Our Understanding* at 635 (1979).

## II

### CONGRESS' INTENT MILITATES AGAINST THE GOVERNMENT'S CONSTRUCTION OF THE CWA. MEASURED AGAINST A PROPER CONSTRUCTION OF THE ACT, THE CORPS' 1975 AND 1977 REGULATIONS, AS INTERPRETED BY THE DISTRICT COURT AND THE GOVERNMENT, FAR EXCEED THE CORPS' STATUTORY AUTHORITY.

#### A. Because the Corps' Regulatory Response to the CWA Definition of "Navigable Waters" Has Been Marked by Radical Changes and Inconsistencies Including the Present Effort to Exceed the Authority of the Act, Deference to the Corps' Construction of the Act is Not Warranted.

The government's contention that the court of appeals should be reversed on the ground that deference should be given to the Corps' interpretation of its own regulations borders on ludicrous. The Corps has, since 1972, adopted no less than six different wetland definitions. Commencing with its initial definition of "navigable waters," 38 Fed. Reg. 12217 (1973) (amending 33 C.F.R. § 209.120), and ending with the 1977 regulations, the Corps' efforts to define "navigable waters" have been marked by radical changes in policy and the use of ambiguous terminology.

Curiously, the Corps did not initially exhibit its unrestrained appetite for wetland regulation. In the first set of regulations it adopted to implement section 404, 38 Fed. Reg. 12217 (1973), the Corps, in defining "navigable waters," merely copied the statutory definition. These regulations did, however, offer the first wetlands definition: "[T]hose land and water areas *subject to regular inundation* by tidal, riverine, or lacustrine flowage." 38 Fed. Reg. 12220 (1973) (amending 33 C.F.R. § 209.120(g)(3)) (emphasis added). This description of wetlands was included in each succeeding set of regulations until it was eliminated on July 19, 1977.<sup>25</sup>

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<sup>25</sup> The 1973 wetlands definition, 33 C.F.R. section 209.120(g)(3), appears in that portion of the regulations setting forth the policies to govern treatment of permit applications. The definition remained in this

The Corps' next effort to define "navigable waters" occurred on April 3, 1974. 39 Fed. Reg. 12115 (1974) (amending 33 C.F.R. § 209.120). These "final" regulations defined "navigable waters" for purposes of the CWA in terms identical to the Corps' definition of "navigable waters of the United States" under the old Rivers and Harbors Act. 39 Fed. Reg. 12119 (1974) (amending 33 C.F.R. § 209.120). In proposing this definition, the Corps acknowledged that Congress intended that the CWA definition of "navigable waters" be given its "broadest possible constitutional interpretation unencumbered by agency determinations that have been made or may be made for administrative purposes." The Corps went on to conclude that such an interpretation was equivalent to the definition of "navigable waters of the United States" it had used for years. *See* 39 Fed. Reg. 12115 (1974).

The Corps' restriction of its jurisdiction under the CWA to its Rivers and Harbors Act limits was clearly wrong. This was quickly confirmed in two enforcement actions initiated by the EPA after the Corps had refused to prosecute. In *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), the EPA challenged the unauthorized filling of a wetland that was located above the mean high waterline, but was inundated daily by tidal waters. Similarly, in *United States v. Ashland Oil & Transportation Co.*, 364 F. Supp. 349 (W.D. Ky. 1973), the EPA initiated criminal prosecution for the unauthorized discharge of pollutants into a non-navigable tributary to a navigable waterbody. In both cases, the district courts concluded that Congress intended "navigable waters" as used in the 1972 amendments to the CWA to include the types of waterbodies involved.

The interagency dispute that raged between the EPA and the Corps over the proper interpretation of the CWA led to the filing of *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (hereafter *Callaway*), against the Corps and EPA. The purpose of the suit was to compel the Corps to revoke its April 3, 1974 regulations and to adopt a definition of

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portion of the regulations even after the adoption of amendments to other portions of the regulations that contain different wetland definitions. *See* 40 Fed. Reg. 31324, 31328 (1975).

"navigable waters" more in line with the posture taken by the EPA in the *Holland* and *Ashland Oil & Transportation Co.* cases.

The Justice Department undertook to represent both the Corps and the EPA, notwithstanding the fact that it had publicly taken a position consistent with that of the plaintiffs and EPA and contrary to that of its client, the Corps.<sup>26</sup> Effectively, the Corps was without representation in the proceedings. The Justice Department at no time offered a defense on the merits.<sup>27</sup>

The district court granted plaintiffs' motion for partial summary judgment, striking down "so much of 39 Fed. Reg. 12115, et seq. (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'waters of the United States.'" The court ordered the Corps to promulgate new regulations.<sup>28</sup> *See Callaway*, 392 F. Supp. at 686. The decision was not appealed.

The Corps responded to the court order in *Callaway* by publishing proposed tentative regulations on May 6, 1975, 40 Fed. Reg. 19766, in which it offered four alternative definitions for public comment.

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<sup>26</sup> See Letter of Aug. 16, 1974, from Wallace H. Johnson, Assistant Attorney General, to Manning E. Seltzer, Office of the General Counsel, U.S. Army Corps of Engineers (Exh. 3 to Plaintiff's Statement of Material Facts as to Which Plaintiffs Contend There is No Genuine Issue Filed in Support of Motion for Summary Judgment, Nov. 21, 1974).

<sup>27</sup> See *Callaway Motion to Dismiss*, filed October 18, 1974; *Callaway Opposition to Motion of Plaintiffs for Partial Summary Judgment*, filed Jan. 6, 1975.

<sup>28</sup> Contrary to statements contained in many lower court opinions, the district court in *Callaway* did not endeavor to define for the Corps the reach of its jurisdiction under the CWA. The court merely ordered the Corps to adopt regulations consistent with the statutory definition of "navigable waters." In fact, Judge Robinson was of the view that the CWA definition of navigable waters and his order did not reach inland lakes, which he believed were not navigable waters under the CWA. Tr. Apr. 4, 1975 at 9-10.

On July 25, 1975, the Corps published "interim final regulations" in which it reformulated its definition of "navigable waters" under the CWA. 40 Fed. Reg. 31320-31343 (1975). Having initially failed to go as far as Congress intended, the Corps now went to the other extreme.

The 1975 regulations amending 33 C.F.R. § 209.120(d)(2) (1975) defined "navigable waters" as including (with respect to inland waters) rivers, lakes and streams that are "navigable waters of the United States" up to their headwaters, tributaries of those waterbodies, interstate waters, and intrastate lakes, rivers and streams that are utilized for certain specified purposes in interstate commerce. 40 Fed. Reg. 31324 (1975). Freshwater wetlands that are "contiguous or adjacent to other navigable waters and that support freshwater vegetation" were also included in the definition of navigable waters. Freshwater wetlands, in turn, were defined as

those areas that are *periodically inundated* and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction . . .

40 Fed. Reg. 31324-31325 (1975) (emphasis added).

The 1975 regulations, through any commonsense reading, contemplate that for wetlands to be classified as "navigable waters," they must be periodically inundated by an adjacent or contiguous navigable waterbody.<sup>29</sup>

In 1977, the Corps propounded another set of "final" regulations purporting to define "navigable waters" for purposes of section 404 of the CWA. 42 Fed. Reg. 37122-37164 (1977). Again, the Corps modified its definition of wetlands, explaining that it was endeavoring to clarify what it perceived to be uncertainty in the July 1975 version. See 42 Fed. Reg. 37128 (1977).

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<sup>29</sup> This construction is in harmony with the original 1973 definition of wetlands (those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage) which was perpetuated in the 1975 regulations, but in a different section. 40 Fed. Reg. 31328 (1975) (33 C.F.R. § 209.120(f)(3)).

Under the 1977 regulations, freshwater wetlands are characterized as navigable waters only if they are *adjacent*<sup>30</sup> to any inland waters, lakes, rivers and streams that are "navigable waters of the United States," tributaries to such waters, or interstate waters and their tributaries. 42 Fed. Reg. 37144 (1977) (amending 33 C.F.R. § 323.2(a)(3), (4)). "Isolated wetlands" or wetlands that are not adjacent to navigable waters can only be regulated if "the degradation or destruction of [such wetlands] could affect interstate commerce."<sup>31</sup>

Wetlands are now defined as

those areas that are *inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

42 Fed. Reg. 37144 (1977) (codified at 33 C.F.R. § 323.2(c)) (emphasis added).

The government argues that the 1977 regulations are susceptible to an interpretation that would, for the first time, include as "navigable waters" lands that support "wetland" vegetation solely because of poor drainage or a seasonally high water table and not because of inundation from any waterbody. This is a significant departure from the Corps' original concept that for wetlands to be treated as navigable waters they must be regularly inundated by

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<sup>30</sup> The term "adjacent" is defined as:

[B]ordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

42 Fed. Reg. 37144 (1977) (codified at 33 C.F.R. § 323.2(d)).

<sup>31</sup> Thus, in the case of isolated wetlands, a factual inquiry to determine whether the filling of the area could affect interstate commerce is required before the Corps can assert jurisdiction. No such finding was made here.

surface waters. It is an even greater departure from the jurisdictional reach Congress intended for the CWA.<sup>32</sup>

As noted by the court of appeals here, the 1977 regulations' description of those wetlands that are "navigable waters" does not stand alone. It is accompanied by a lengthy preamble from which that court concluded that soils in "wetland" areas must become saturated by frequent inundation from an adjacent water for the area to come within the reach of the Corps' regulatory authority. 42 Fed. Reg. 37127-37128 (1977); Pet. App. 9a.

The ambiguity in the 1977 regulations concerning whether soils saturated by conditions unrelated to an adjacent water of the United States can be regulated under the CWA was one of a number of problems identified by the Presidential Task Force on Regulatory Relief on May 7, 1982. 48 Fed. Reg. 21466 (1983). In response, the Corps has proposed certain amendments to its regulations—amendments it proclaims are but a "clarification" of its existing wetlands definition and not an effort to change the scope of its jurisdiction. 48 Fed. Reg. 21467 (1983). As clarified by the Corps, wetlands constituting "waters of the United States" are only those "bordering, contiguous, or immediately neighboring and having a reasonably [sic] perceptible [sic] surface or subsurface hydrologic connection to a water of the United States." 48

<sup>32</sup> Several federal courts have held that the CWA does not empower the EPA to control discharges into groundwater. See *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977); *United States v. GAF Corporation*, 389 F. Supp. 1379 (S.D. Tex. 1975); but see *United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1187 (D.C. Ariz. 1975). In reviewing the language of the CWA itself, as well as its legislative history, the court in *Exxon* concluded:

What we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters.  
*Exxon*, 554 F.2d at 1322; See also 1329.

The legislative history of the act reveals that Congress rejected amendments to the CWA that would have provided for the regulation of groundwater pollution. *Id.* at 1328-1329.

Fed. Reg. 21474 (1983) (amending 33 C.F.R. § 328.3[b]) (emphasis added).<sup>33</sup>

By the Corps' own reckoning, the court of appeals' decision in this case accurately reflects the intent of both the CWA and the 1977 regulations. The district court below found that there was no hydrologic connection between Riverside's property and any water of the United States (i.e. the Clinton River, Lake St. Clair, or Black Creek). Pet. App. 25a, 37a. The court of appeals correctly concluded that since whatever wet soil conditions exist on Riverside's land are not the result of inundation from a water of the United States, the area is not subject to regulation by the Corps under section 404 of the CWA—precisely the reasoning and the result that would obtain under the Corps' 1983 clarification of its own regulations.

Ignoring this published clarification, the government urges that questions concerning the jurisdictional reach of the CWA be resolved by deferring to the Corps' past construction of its own regulations. Between 1972 and 1977, however, the Corps proposed no fewer than five wholly different definitions of navigable waters insofar as wetland areas are concerned. To this, we should add a sixth—the 1983 clarification. These various and varying interpretations differed not merely in minor technical phraseology, but in fundamental concepts as well. The definitions ranged from those that retreated from even the traditional definition of navigable waters of the United States to those that extended to areas that are not waters of any sort. Where an agency manifests this type of vacillation and indecision, its interpretation of a statute does not warrant deference by the courts. *Secretary of the Interior (Watt) v. California*, 464 U.S. 312 (1984); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

<sup>33</sup> The May 12, 1983 proposed regulations are described by Hon. William R. Gianelli, Assistant Secretary of the Army, as being a "clarification of the scope of the Corps' jurisdiction." *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2596-2598 (1983) (testimony of Asst. Secretary of the Army William R. Gianelli).

This Court, not the Corps, is the final authority on the question of the construction of the CWA and the limits of those areas Congress intended to classify as "navigable waters" under that act. *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978); *Federal Trade Com. v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). An agency construction of the statute that is inconsistent with this mandate cannot be upheld. *S.E.C. v. Sloan*, 436 U.S. at 118; *F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 272 (1968). In other words, deference to agency construction of a statute is appropriate only where the agency's interpretation is in accord with the express wording of the statute and has been long-standing as well as consistent. *S.E.C. v. Sloan*, 436 U.S. at 117; *Volkswagenwerk*, 390 U.S. at 272-273; *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. at 745-746. An agency will not be permitted to "bootstrap itself into an area in which it has no jurisdiction" by construing its authorizing statutes in an inappropriate manner. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. at 745.

This Court should not defer to the Corps' construction of the CWA. First, Congress, in adopting section 502(7) defining "navigable waters," had in mind specific waters that would fall within that definition. Those waters do not include poorly drained areas that are not a part of or regularly inundated by a navigable water. Second, the Corps' interpretation of that section has been in a state of perpetual vacillation, ranging from a construction that falls far short of Congress' initial intent to one that by all accounts far exceeds anything Congress had in mind. Lastly, the interpretation argued for by the government is patently unreasonable. "Wetlands" have never been classified as navigable waters in their own right. They can only be considered "navigable waters" under the CWA to the extent that they are inundated by navigable waters. It is for this reason that the term "adjacent" and equivalent terms first appeared in the Corps' regulations. Such terms served as a means of identifying those "wetlands" considered to be part of a navigable water. Now, the government maintains that the 1977 regulations do not require inundation from the "adjacent" waterbody at all. This claim would, for the

first time, classify as "navigable waters" areas that possess wet soils but are unrelated to any waterbody. Were the government's view accepted, one could well wonder why the Corps has always considered, and still considers, it important for a "wetland" to be "adjacent" to a waterbody. If a "wetland" and a waterbody have no hydrologic connection, what difference does their relative geographic proximity make for purposes of the CWA? Nothing in the CWA supports the government's construction.

The government would have this Court defer to an agency that has not only been inconsistent in implementing its regulations, but has extended those regulations in a manner unauthorized by Congress. The chaos wrought by the Corps in its implementation of section 404 demands judicial rebuke, not judicial deference.

**B. The Corps' Interpretation and Construction of Its Own Regulations With Regard to Riverside's Land Has Been Arbitrary and Unreasonable and Was Properly Rejected by the Court of Appeals.**

Having received what it erroneously perceived to be the "green light" to expand its jurisdiction without limitation as a result of the *Callaway* district court decision, the Corps has shed all vestiges of restraint in claiming authority over wetland areas. Thus, the Corps, in its *Wetlands Delineation Manual* goes so far as to include as "navigable waters" subject to Corps jurisdiction land that is saturated for as little as five percent of the growing season (which is far less than an entire calendar year) and that supports trees and other types of upland vegetation that merely tolerate wet soils for relatively short periods of time. See *Wetlands Delineation Manual* at 24-25, 43, 68. It is this type of thinking that led the Corps to assert jurisdiction over Riverside's property.

The Corps claims that the property is a "navigable water" even though it is not a part of or inundated by water from any waterbody; it was actively farmed for close to 60 years; it is partially developed with sidewalks, sewers, and fire hydrants in place; and its present condition is the result of physical alteration of the surrounding areas through development and flood control efforts in which the Corps participated. Assertion of jurisdiction

under these facts was correctly found by the court of appeals to be an unreasonable construction of the Corps' regulations and the CWA.

The government, seemingly aware of the fact that the Corps' actions here have been arbitrary at best, seeks to justify its position by asserting that a broad test for threshold jurisdiction over wetlands will somehow result in ease of administration for both the Corps and affected owners. The government builds upon this contention by claiming that "jurisdictional rules are of only limited utility" and thus they "should be established as broad as possible to allow all decisions regarding wetlands or potential wetlands to be made within the permit process allowed by the Corps alone." Pet. Brief 40-41. The government's position is truly disingenuous. It totally ignores the fact that assertion of jurisdiction over Riverside's property on the basis that it is a "wetland" virtually assures that no economic use of these lands is possible in view of the Corps' regulations and the mandatory guidelines imposed upon the Corps by the EPA. See 40 C.F.R. § 230.10-230.61 (1983); 49 Fed. Reg. 39478 (1984) (amending 33 C.F.R. § 320.4). It also ascribes greater expertise, fairness and efficiency to the Corps' implementation of its permit program than is justified. See Presidential Task Force on Regulatory Relief, *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (1982). In fact, the Corps' treatment of Riverside here exemplifies the type of arbitrary and unreasonable treatment landowners seeking permits from the Corps can expect. It took the Corps more than five years to process Riverside's permit, after which time the permit request was denied.

The government urges that the Corps' regulations be validated because they establish a jurisdictional test that can be readily applied by both landowners and regulators. Pet. Brief 43. This statement displays a total lack of knowledge of existing wetlands identification procedures. The *Wetlands Delineation Manual* presently employed by the Corps for delineating wetland areas

subject to its jurisdiction is more than 100 pages in length.<sup>34</sup> The bulk and complexity of the manual is simply an admission of the fact that in employing the very test the government urges be adopted, the determination of whether an area is a "wetland" subject to the Corps' jurisdiction can be very difficult. Requiring that the area be inundated regularly from a bordering water of the United States adds nothing by way of difficulty to an already complicated task. See *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 281-284 (W.D. La. 1981), aff'd and rev'd *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 907-908, 910-913, 930-934 (5th Cir. 1983). In fact, the *Wetlands Delineation Manual* requires that a hydrologic study, together with a soil and vegetation analysis, be performed in every instance in order to determine whether an area is a wetland. *Wetlands Delineation Manual* at 7. Positive indicators from each of three areas—hydrology, soils, and vegetation—are required.<sup>35</sup> See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 930-934.

Contrary to the suggestion of the government, wetland determinations are not made by the landowner or the Corps through casual observation of the property—although that is precisely what occurred here with regard to Riverside's property.<sup>36</sup> They

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<sup>34</sup> The present version of the *Wetlands Delineation Manual* was published in January 1985 by the Corps. Although it purports to be a "draft," it is currently in use in the various district offices throughout the country.

<sup>35</sup> In this regard, the test employed by the Corps for determining whether an area is a wetland differs significantly from that employed by the Fish and Wildlife Service. See *Classification of Wetlands* at 3-4. The Fish and Wildlife Service system requires that a positive indicator of wetlands be present in only one of the three parameters employed by the Corps, while the Corps requires positive indicators in all three. *Wetlands Delineation Manual* at 8-9. This fact should be kept in mind when reviewing various federal publications discussing wetlands. Thus, publications such as the *Classification of Wetlands*, portions of *OTA Wetlands*, and *National Wetlands Inventory* employ the Fish and Wildlife Service definition—not that utilized by the Corps.

<sup>36</sup> The Corps' wetland determination upon which it predicted the institution of this litigation constituted a five-minute fly-over of the

require the use of highly skilled experts who are competent to analyze the vegetation, soils and hydrology of the site. A determination that the saturated soil conditions be related to frequent inundation from a navigable water requires no additional inquiry other than what is normally included in any competently performed wetlands determination. See *Wetlands Delineation Manual* at 9-12, 41-47. Thus, by insisting that wetland areas either be a part of or frequently inundated by a bordering navigable water in order to be classified as "navigable waters" within the CWA, the court of appeals adopted a test for delimiting those waters subject to regulation that is both rational and consistent with current wetland technology and the intended scope of the CWA.

**C. The 1977 CWA Amendments Do Not Expand the Reach of Section 404 Beyond Those "Navigable Waters" That Were Intended to Be Included Within the CWA When Congress Enacted It in 1972. Therefore, Statements By Legislators After the Enactment of the 1972 CWA Amendments Do Not Reflect Legislative Intent Regarding Those Portions of the Act Defining "Navigable Waters."**

The Corps' implementation of its responsibilities under section 404 of the CWA was the subject of widespread criticism from the very beginning. Initially, upon adoption of its 1974 regulations defining "navigable waters" under the CWA in terms identical to "navigable waters of the United States" under the Rivers and Harbors Act, the criticism came from the EPA and various environmental groups who were concerned with the Corps' recalcitrance in carrying out the very obvious intent of Congress. This, as mentioned earlier, led to the filing of *Callaway* and a judicial order requiring the Corps to revise its regulations. As if to spite its critics, the Corps intentionally went to the other extreme. Congressional hearings relative to the Corps' excessive conduct were held in 1975, 1976 and again in 1977, culminating in several amendments to the section 404 program in 1977. The most that can be said for the various congressional hearings is that they provided legislators ample opportunity to express virtually every

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property and a quick visit to the site by a Corps employee who took no samples and was unable to identify any of the vegetative species growing on the site. J.A. 29-30.

view imaginable on the subject of wetland regulation without risk of being held accountable for any specific piece of legislation.

A great deal of opposition to the Corps' position on wetland regulation came from agricultural interests that were understandably concerned about the fact that the Corps had proclaimed that a large percentage of the best agricultural land in the country would fall within its wetland definition.<sup>37</sup> The 1977 amendments to section 404 were in great measure a congressional compromise designed to quiet the rather considerable objections being voiced by the nation's farmers.<sup>38</sup>

Although the legislative debates on the 1977 amendments contain expressions of the full spectrum of opinion concerning whether wetlands should be regulated, one universal complaint was expressed—the Corps had far exceeded the original intent of Congress. Typical are the comments of Senator Muskie—perhaps the most outspoken proponent of the CWA:

There is not a Senator on the floor, including the Senator who is speaking, who supports section 404 as it has been interpreted and implemented by the Corps of Engineers. Much of the rationale of the Bentsen amendment is based on the reaction of the country to overregulation by the Corps of

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<sup>37</sup> In fact, 40 percent of all non-federal lands possessing wet soils are used for agriculture. These soils account for slightly less than 25 percent of the total cropland in the United States. More than 50 percent of this land is classified as prime agricultural land by the United States Department of Agriculture. See Soil Conservation Service, United States Department of Agriculture, *Interagency Report* at 31-32 (1978).

<sup>38</sup> The 1977 amendments accomplished three goals. First, they provided for a general permit program that authorized the Corps—on a nationwide basis—to permit numerous activities that were deemed not to have a significant effect on water quality. CWA § 404(e), 33 U.S.C. § 1344(e). Second, normal farming, silviculture, and ranching activities such as plowing, seeding, and construction of drainage facilities were exempted from the CWA. CWA § 404(f), 33 U.S.C. § 1344(f). Third, a state could undertake to administer its own permit program for the discharge of dredged or fill material into navigable waters.

Engineers of small farmers, foresters, normal agricultural activities, and so on.

Nobody defends section 404 . . . .

\* \* \*

*[S]ection 404 was enacted into law in 1972. The Corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of Congress . . . .*

4 Legis. Hist. 947-948 (emphasis added). Statements such as this are hardly a ringing endorsement of the Corps' actions.

Ignoring the 1972 legislative history to the CWA, the government maintains that statements made by individual legislators in 1977 constitute either a congressional affirmation of the Corps' practices or a manifestation of legislative intent that should be engrafted onto the 1972 legislative history of the CWA. These post-passage remarks, no matter how explicit, cannot and do not express the legislative intent at the time of passage of the CWA. They merely represent personal views of certain individual legislators expressed years after Congress as a whole had acted. By placing greater significance on after-the-fact statements of legislators made under circumstances in which no legislative action was taken than on the wording of the CWA and its explicit contemporaneous legislative history, the government indulges in a bootstrap approach to statutory construction that has been consistently rejected by this Court. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947); *Woodwork Manufacturers Asso. v. NLRB*, 386 U.S. 612, 639 n.34 (1967).

The government also argues that this Court should attach significance to the fact that Congress did not amend the CWA in 1977 to explicitly reject the Corps' expansive jurisdictional claims as represented in the 1975 regulations or to reverse broad interpretations of the CWA contained in some judicial decisions.<sup>39</sup>

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<sup>39</sup> The regulations that were in effect during the legislative consideration of amendments to section 404 in 1977 were the July 25, 1975

This legislative inaction, the government maintains, is an expression of legislative intent, to which this Court should defer. The government is plainly wrong in its position, for it has long been held that the failure of Congress to act cannot be construed as an expression of legislative intent since it is susceptible to any number of inferences. *United States v. Wise*, 370 U.S. 405 (1962); *Federal Trade Com. v. Dean Foods Co.*, 384 U.S. 384 U.S. 597 (1966); *Helvering v. Hallock*, 309 U.S. 106 (1940). As stated by this Court:

[T]o give weight to the nonaction of Congress [is] to "venture into speculative unrealities."

*Federal Trade Com. v. Dean Foods Co.*, 384 U.S. at 609 n.11.

This principle governed a remarkably similar situation in *National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.D.C. 1979). There, the government unsuccessfully offered the same argument with regard to the interpretation to be given the Corps' amendments to its regulations in which it sought, *inter alia*, to abandon the requirement of an interstate connection for navigable waters under section 10 of the Rivers and Harbors Act. In 1976, Congress reacted to the revised regulations by contracting the Corps' jurisdiction through legislative exemptions pertaining to certain intrastate lakes and wharf construction. The government argued that Congress' failure to formally reinstate the requirement of an interstate connection constituted a tacit adoption of the Corps' new regulations. The court of appeals squarely rejected this notion, pointing out that congressional inaction does not necessarily imply approval.

In sum, we do not believe that Congress' failure to correct all the problems it has found with the Corps' new regulations suggests ratification of the provisions it has not yet addressed.

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regulations which, as discussed *infra*, require that for freshwater wetlands to be subject to regulation as waters of the United States, they must possess saturated soils that are the result of periodic inundation from a contiguous or adjacent navigable water. Thus, to the extent that any inference can be drawn from congressional inaction in 1977, it must be considered with reference to the 1975 regulations and not the 1977 version.

Rather, we believe its voiced dissatisfaction with them indicates disagreement.

*National Wildlife Federation*, 613 F.2d at 1065.

In sum, nothing has happened since adoption of section 502(7) of the CWA in 1972 that in any way alters the original interpretation Congress intended to be given the term "navigable waters." The CWA encompasses those waterbodies that are navigable in fact and non-navigable portions and tributaries of such waterbodies. "Wetlands," *to the extent that they form a part of those waterbodies or are regularly inundated by navigable waters*, are properly to be considered subject to the CWA. However, unconnected low-lying areas that are not regularly inundated by waters from a navigable water are not incorporated within the navigable waters definition of the act and, therefore, are not subject to the Corps' section 404 jurisdiction.

### III

#### THE ONLY TWO COURT OF APPEALS DECISIONS TO CONSIDER THE QUESTION OF WHETHER A "NAVIGABLE WATER" WITHIN THE MEANING OF THE CWA EXTENDS TO SATURATED SOIL AREAS NOT REGULARLY INUNDATED BY A NAVIGABLE WATER HAVE CONCLUDED THAT THE ACT WAS NOT INTENDED TO REACH THOSE LANDS.

The government endeavors to buttress its extravagant interpretation of the CWA by referring to broad statements contained in some lower court decisions to the effect that Congress intended to give the definition of "navigable waters" a broad interpretation consistent with the limitations upon Congress to regulate waters under the Commerce Clause. However, in determining how far Congress intended to regulate under the Commerce Clause, the wording of the CWA cannot be ignored. That act limited Commerce Clause regulation to "navigable waters," which in turn is defined as "waters of the United States." This definition is broad enough to include areas that form a part of those waters and are regularly inundated by them, but not land that is neither a part of a waterbody nor regularly inundated by it.

The cases relied upon by the government simply do not support the proposition that Congress intended to include within the CWA land areas that are sometimes wet for reasons unrelated to frequent inundation from a water of the United States. Thus, in virtually every "wetland" case cited by the government, the area addressed received regular, if not daily, inundation from an adjoining water of the United States. *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (the holding of which the plaintiffs in *Callaway* sought to have engrafted into new Corps regulations), involved wetlands that bounded a tidal waterbody and, although they lay above the mean high waterline, received *daily inundation* by the tides. The land in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), was a backwater swamp annually flooded by adjoining rivers for durations extending up to six months at a time. The wetlands in *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983), were directly linked hydrologically to a river 30 feet away. In *United States v. Texas Pipe Line Company*, 611 F.2d 345 (10th Cir. 1979), a discharge of oil into an unnamed tributary of a named creek that discharged into the Red River was an issue. The court found that the oil flowed from the point of discharge through the tributaries into the river. *State of Utah by & through Div. of Parks v. Marsh*, 740 F.2d 799 (10th Cir. 1984), did not concern wetlands at all, but rather an intrastate lake—Utah Lake—the largest freshwater lake in the State of Utah. The lake has a surface area of 150 square miles and is used for purposes in interstate commerce. The court in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978), considered the effect of the CWA on thousands of acres of salt ponds that, although not subject to tidal action, were submerged by waters taken from San Francisco Bay to the extent of 8 to 9 billion gallons per year and employed in the production of salt transported in interstate commerce throughout the western states. In *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), the court found as a fact that the areas characterized by wetland vegetation bordering a large lake were periodically inundated by waters from the lake as well as water from other sources.

In *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985), the land involved was a large wetland area through which water

flowed on its way to a surrounding federal wildlife refuge. The source of the water is not clear from the opinion. Further, the landowner never challenged the authority of the Corps to regulate the area as wetlands under the CWA, and thus the issue was neither presented to nor determined by the court. The court only considered whether, under the circumstances present, the agricultural exemption contained in the 1977 regulations would be applied to accommodate Huebner's expanding operations.

The one case that rather closely parallels this dispute is *United States v. City of Ft. Pierre*, 747 F.2d 464 (8th Cir. 1984). There, the court held that section 404 did not reach wetland areas that did not form naturally and that existed principally through changes in drainage patterns resulting from the Corps' dredging activities in the Missouri River. The area in question had historically been a side channel of the Missouri River but had been separated from that waterbody in 1907 by construction of a railroad bridge approach. For the next 60 years the area was dry and wooded. This condition was altered in the 1960s when the Corps, as a part of its regular river maintenance dredging, altered drainage patterns to such an extent that the soils became saturated and supported wetland vegetation.

Contrary to the government's claim, lower court decisions have not squarely dealt with the issue presented here. *United States v. City of Ft. Pierre* comes the closest and there the court of appeals ruled against the government's position. The court of appeals in *United States v. City of Ft. Pierre*, as did the lower court here, found that Congress did not intend to include as "navigable waters" under the CWA areas whose soils become saturated for reasons unrelated to natural surface inundation from an adjoining water of the United States.<sup>40</sup>

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<sup>40</sup> The court of appeals in *United States v. City of Ft. Pierre* rejected the government's argument that it makes no difference how or when an area becomes a wetland. The government makes the same claim here and it should similarly be rejected.

#### IV

### GIVEN THE TOTAL ABSENCE OF ANY GUIDELINES OR CRITERIA IN THE CWA BY WHICH THE CORPS CAN MEASURE ITS IMPLEMENTATION OF THAT ACT IN WETLAND AREAS, A CONSTRUCTION OF THE ACT THAT RESULTS IN THE BROAD DELEGATION CLAIMED BY THE GOVERNMENT CONSISTUTES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE FUNCTIONS TO AN AGENCY.

The government conveniently overlooks the fact that nowhere in the CWA is there any suggestion that the Corps is to regulate land that is unrelated to any waterbody. The government asks that this Court infer such a delegation. To do so, however, not only requires that this Court conclude that Congress intended to regulate 100 million acres of land (excluding Alaska) without specifically saying so, but also delegated responsibility for this vast job to the Corps without providing any guidelines or criteria to guide the Corps in the administration of its delegated duties.<sup>41</sup> In the government's view, Congress left to the Corps the determination of how far its jurisdiction should extend, under what circumstances permits should be granted, and what criteria are to be employed for the granting or denial of permits. These are, however, fundamental policy considerations that are legislative in nature. Accepting the government's view would acknowledge that Congress delegated its legislative power to the Corps. Interpreted in this way, the CWA would violate the constitutional prohibition against the delegation of legislative functions to an agency. See *Industrial Union v. American Petrol. Inst.*, 448 U.S. 607, 673-674, 684-687 (1980) (Rehnquist concurring); *United States v. Robel*, 389 U.S. 258, 274-276 (1967); *Panama Refining Co. v. Ryan*,

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<sup>41</sup> The government's position here is inconsistent with the views of the Assistant Secretary of the Army (Civil Works), W. R. Gianelli, who in 1983 admitted that the CWA was neither intended nor designed to regulate wetlands. See *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2596-2598 (1983) (testimony of Asst. Secretary of the Army William R. Gianelli).

293 U.S. 388, 428-430 (1935); *Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407-409 (1928).

The CWA must be interpreted so as to avoid questions of its constitutionality. *Industrial Union v. American Petrol. Inst.*, 448 U.S. at 646; *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The court of appeals avoided construing the CWA in a fashion that would call into question its constitutionality relative to an unbridled delegation to the Corps of legislative functions.<sup>42</sup> It did so by placing a reasonable limit upon the definition of "navigable waters"—the requirement that the area be inundated by waters from a navigable water.

## V

**WETLAND REGULATION, EXCEPT WITH RESPECT TO WETLANDS THAT ARE A PART OF NAVIGABLE WATERS, IS NOT THE SUBJECT OF THE CWA AND HAS BEEN LEFT TO THE STATES.**

There can be little question from reading the government's and its supporting amici briefs that what is sought here is to expand the CWA into the equivalent of a national wetlands preservation act through use of the Corps' 404 dredge and fill program. The government's announced goal in seeking reversal of the court of appeals is to freeze the nation's wetlands in their present state.<sup>43</sup>

<sup>42</sup> The lack of any guidelines or criteria in the CWA relative to wetland regulation is exacerbated by the fact that violation of section 404 carries heavy criminal and civil penalties. 33 U.S.C. § 1344(s).

<sup>43</sup> The government ignores the fact that it is the federal government that has been responsible in large measure for the conversion of more than 65 million acres of wetlands into valuable agricultural lands. This has occurred through the swamp land acts of 1849, 1850 and 1860, by which the United States granted to fifteen states, including Michigan, approximately 65 million acres of swamp land for the express purpose of reclaiming those wetlands through the construction of levees and drains in order to transform these swamp and overflowed lands into valuable lands, usable for agricultural and other purposes. 43 U.S.C. § 981; *National Wetlands Inventory* at 33; *Circular 39* at 5-7; Donaldson, *The*

*See generally OTA Wetlands; National Wetlands Inventory; Circular 39.*

A large percentage of the "wetlands" claimed by the government to be subject to Corps regulation are similar to Riverside's property in that they have no water connection or relationship to any waterbody and possess wet soil conditions solely because of poor drainage.<sup>44</sup> These lands are obviously capable of being used for a wide variety of purposes. In fact, lands possessing wet soil produce approximately 25 percent of the major crops grown in the United States.<sup>45</sup> Use of these and many other low-lying areas for agriculture and other purposes poses no threat to water quality. The same is true of Riverside's land which, as the district court found, has no water connection to any waterbody and, thus, the placement of fill on the property will not impact water quality.

By seeking an interpretation of the definition of "navigable waters" that includes all "wetland" areas (including those that are not necessary to prevent water pollution) in order to prevent conversion of these lands to some other use, the government is asking that the Corps be authorized to engage in land use planning. Such determinations have historically been left to the states, not the federal government. *See Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 187 (3rd Cir. 1983). Congress did not intend that the CWA infringe upon the states' prerogative of land use regulation. 33 U.S.C. § 1251(b); *see also Mississippi Comm. on Natural Resources v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980).

Wetland regulation is widespread at the state level. Most states have some form of wetland regulation. Michigan possesses a

*Public Domain* at 219-220 (1970). Confirmation of swamp and overflowed lands to the states under the swamp land acts still continues.

<sup>44</sup> *See generally Classification of Wetlands; National Wetlands Inventory; Circular 39; Wetlands Delineation Manual.*

<sup>45</sup> *See Soil Conservation Service, U.S. Dept. of Agriculture, Interagency Report* at 31-32 (1978); American Water Resources Association, *Wetland Functions and Values: The State of Our Understanding* at 633-640 (1979).

comprehensive wetland regulatory act, the "Goemaere-Anderson Wetland Protection Act." Mich. Comp. Laws Ann. § 281.701, et seq. (1980).<sup>46</sup> This act has a greater geographic reach than even the Corps' construction of the CWA. It regulates not only wetlands that are regularly inundated by a waterbody, but also isolated wetland areas. The dredging, filling, draining, construction and development of a wetland is prohibited except under permit. The criteria governing the granting or denying of a permit are tailored to the specific needs of Michigan. The act also provides that in the event a taking of property occurs through its implementation, compensation is to be paid. Mich. Comp. Laws Ann. § 281.721 (1980).

The government's contention that the CWA must be broadly construed to incorporate all wetlands in order to preserve these areas for ecological reasons simply has no applicability in Michigan and other states that possess their own far-reaching wetland protection acts implemented under the police power. The claimed necessity of pervasive wetland regulation is a makeweight argument offered by the government to justify a major step into the realm of federal land use regulation. However, the argument fails for the simple reason that Congress did not intend the CWA to be an act through which wet soil areas, other than those that are a part of navigable waters, are to be protected. As observed by the district court below, draining areas within the CWA's jurisdiction

<sup>46</sup> In addition to the "Goemaere-Anderson Wetland Protection Act", Michigan also regulates wetland areas through a network of other regulatory schemes. Thus, dredging, filling, construction, and other alterations below the ordinary high watermark on all inland lakes and streams are subject to permit. Mich. Comp. Laws Ann. § 281.951-281.963 (1980). The Michigan State Department of Natural Resources and Water Resources Commission have established a comprehensive plan for the use and management of shorelands on lakes and rivers. Likewise, local governmental units, subject to state approval, regulate erosion-prone areas and areas important to fish and wildlife. Michigan Shorelands Protection and Management Act, Mich. Comp. Laws Ann. § 281.631 (1980). State permits are also required for activities in state-identified floodplain areas. Mich. Comp. Laws Ann. §§ 323.5(b), 560.117 (1980).

is not prohibited by the act. Pet. App. 30a. Thus, there is no bar to drying out, and thereby destroying, wetland areas. Nor does the CWA prevent excavating, flooding or burning of wetland areas, or the removal of wetland vegetation. See *OTA Wetlands* at 94-110, 168-169. Surely, if wetland preservation were the focus of the act, these means of eliminating wetlands would have been regulated.

The total absence of any reference to wetland regulation in the CWA must be juxtaposed to those federal acts that Congress has adopted for the specific purpose of protecting or acquiring those wetland areas that require federal protection. The existence of these federal wetland protective measures demonstrates not only that ample protection for wetlands currently exists, but also that Congress knows how to regulate wetlands when it chooses to do so. The vehicle most often employed by Congress to protect wetlands has been either to acquire the land or to offer financial assistance to private owners of wetlands to encourage the preservation, restoration and rehabilitation of the areas for fish, bird, and wildlife habitat, soil conservation, water pollution control, and flood control. For example, the Water Bank Act, 16 U.S.C. §§ 1301-1311, established a program for wetlands preservation by providing financial incentives to private owners to prevent loss of wetlands. Congress, proclaiming its purpose in creating the program, found

that it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce run-off, soil and wind erosion, and contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning.

The Federal Aid in Fish Restoration Act, 16 U.S.C. §§ 777-777(k), authorizes federal involvement in and financial aid to the states for the rehabilitation of land or water areas that are

adaptable for fish restoration and conservation purposes. Similarly, the Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669-669(i), provides for federal involvement in comparable projects for wildlife restoration and conservation purposes. The Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, offers blanket protection for coastal wetlands as a part of approved state programs. Lastly, the Wetlands Acquisition Act, 16 U.S.C. § 715(k)(3)-715(k)(5), provides funds "to promote the conservation of migratory waterfowl and to prevent the serious loss of important wetlands." 16 U.S.C. § 715(k)(3).<sup>47</sup>

It is apparent that when Congress has endeavored to protect wetlands, it has openly expressed its purpose and clearly defined the means to implement that purpose. That the CWA lacks any such clear expression relating to "wetlands" refutes the government's contention that the act was intended to implement a wetlands preservation scheme.

## VI

### **APPLICATION OF THE CORPS' WETLAND REGULATIONS TO RIVERSIDE WILL RESULT IN A TAKING OF RIVERSIDE'S PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.**

The court of appeals, in construing the Corps' regulations, was of the opinion that were the regulations to be construed in the manner advocated by the government, the result would be to confer upon the Corps "unbounded jurisdiction" resulting in a taking by the government of Riverside's property in violation of the Fifth Amendment. Pet. App. 13a-16a. That court avoided this outcome by construing the Corps' regulations narrowly. The court

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<sup>47</sup> See also Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (conservation of wildlife and wildlife habitat areas); Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1439 (establishment of marine sanctuaries below the high watermark, including some wetland areas); Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-1005 (providing federal assistance for flood prevention and erosion control of the nation's watershed).

therefore refused to classify "a piece of property a mile inland from Lake St. Clair that has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed" as a "navigable water." Pet. App. 13a-14a. The approach adopted by the court of appeals is patently reasonable and supported by the doctrine that statutes and regulations that may be susceptible of more than one interpretation will not be construed in a fashion to conflict with the Constitution or to effect a taking of property in violation of the Fifth Amendment. *United States v. Security Industrial Bank*, 459 U.S. 70, 74-81 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States v. Johnson*, 323 U.S. 273, 276 (1944).

The Riverside property presently is totally unproductive, lying vacant and unused. Although in former times it had been farmed, that use terminated with the construction of sewers and fire hydrants in the late 1950s and early 1970s. J.A. 84, 93-99. Even if future agricultural use of the land were economically viable—which it is not—that use would hardly be compatible with the existence of site improvements such as sewers and fire hydrants.

Given the present condition of the property, together with local zoning requirements, fill is a necessary element of the development of the property for any economically productive purpose. J.A. 87-88. The Corps has already taken a position as to how it would treat such a proposed fill through its denial of Riverside's permit application. We therefore need not speculate as to what would be the ultimate result were the property to be subjected to the Corps' regulatory scheme. The property would simply remain as it is now, vacant, unused and deprived of any economic productivity.

The government maintains that lands such as Riverside's property should be preserved in their present state. This goal is implemented by the Corps' regulations which provide that it is against the public interest to grant a permit in a wetland area and that a permit be denied for a proposed fill in a wetland area,

except in two limited circumstances.<sup>48</sup> The two exceptions are: (1) a "water dependent" project, or (2) a project for which there is no practicable alternative site available. Neither of these two exceptions apply here.

The necessity that a project, to be constructed in a wetland area, be water dependent points out the absurdity of the government's position relative to whether Riverside's land is subject to section 404 at all. The water-dependency requirement contemplates that wetlands subject to regulation are lands that border a navigable water, for how else could a water dependent project be constructed? Here, Riverside is confronted with the classic Catch-22 situation. To have any opportunity to obtain a permit, it must devote its lands to a water dependent project, but, because of the fact that its lands are nowhere near water, such a project is impossible. This patent inconsistency in the regulations is eliminated by the holding of the court of appeals.

Similarly, the requirement that Riverside must demonstrate that no practicable alternative site is available is also incapable of satisfaction. Practicable alternatives under the regulations include other sites not within the ownership of the applicant. See 40 C.F.R. § 230.10 (1984). Thus, in order to comply with this requirement, Riverside must demonstrate that no other plot of land is available for its proposed project, regardless of ownership. Since the only legally permitted and rational use of Riverside's land is for a housing development, Riverside would have to show that no other land in the area is available for this purpose. This is not the case.

It is beyond question that it is possible, though not permissible, for the enactment of a statute or adoption of a regulation to accomplish a taking of private property in violation of the Fifth Amendment just compensation clause. *Ruckelshaus v. Monsanto Company*, No. 83-196 (June 26, 1984); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-661 (1981) (Brennan dissenting); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979);

<sup>48</sup> 33 C.F.R. § 320.2-4 (1982) (as amended by 49 Fed. Reg. 39478 [1984], incorporating EPA § 404[b][1] guidelines, 40 C.F.R. § 230.10[a], [2], [3]).

*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). The determination of whether such a taking has occurred requires a factual inquiry considering factors such as "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. at 175; *Ruckelshaus v. Monsanto Company*, 467 U.S. \_\_\_\_ (1984).

The court of appeals correctly perceived the taking ramifications of finding the Riverside lands subject to the Corps' jurisdiction. The criteria contained in the Corps' regulations relative to the granting of a permit in a wetland area assure that a permit will be denied. Under such circumstances, the economic impact upon Riverside would be total, for there is no economic use remaining in its lands. The property would remain vacant and unused and the investment-backed expectations of Riverside would be totally thwarted. For close to 30 years, Riverside has been endeavoring to develop these lands for a residential subdivision. The lands have been platted and zoned accordingly. Site improvements in the form of sewers and fire hydrants have been installed. The investment-backed expectation of completing its development cannot be attained if the Corps' regulations are to be applied. Riverside's fundamental property right—the expectation of being able to use the property for some reasonable economic use—will be taken without the payment of compensation in violation of the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). That the taking occurs through what the government claims is the exercise of its rights under the Commerce Clause is of no consequence. It is a taking nonetheless and is prohibited by the Constitution. *Id.* at 172-173.

The taking question here is a serious one—but one that need not be confronted if the court of appeals' construction of the CWA is affirmed. Here, there is no expression by Congress that it intended the definition of "navigable waters" to be construed so broadly that lands such as Riverside's would be subjected to Corps jurisdiction under section 404. In the absence of such an expression of intent, this Court should not adopt a construction of

the act that would impress Riverside's property with Corps jurisdiction, for to do so would lead to an unconstitutional taking. See *United States v. Security Industrial Bank*, 459 U.S. 70 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

### CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeal for the Sixth Circuit should be affirmed.

Respectfully submitted,

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(Appendices follow)

## **Appendix**

1a

January 21, 1977, morning session  
Testimony of Herbert Glascock

**HERBERT GLASCOW,**

having been first duly sworn, was examined and testified upon his oath as follows:

### **DIRECT-EXAMINATION**

**BY MR. DANK:**

Q. Mr. Glascock, let us have your business address and your occupation.

A. Building official, Harrison Township, 38151 L'Anse Creuse.

Q. What period of time have you been a building official?

A. Ten years, in February.

Q. What are your duties?

A. I'm in charge of building, zoning, and ordinances.

Q. Are you familiar with the parcel of land that is the subject of this controversy and the land surrounding it?

A. Yes, sir.

Q. How long—do you reside in Harrison Township?

A. 25 years.

Q. Have you known this area for the past 25 years?

A. Yes.

Q. Are you familiar with the subdivision status of the portion of this parcel of land?

A. I am.

Q. And can you tell us what, if anything, you know about an improvement which may be constructed on this property?

A. There's an easement on the north side of Helzer that sewer lines was installed during the overall picture of—sewer installation picture in the township.

THE COURT: When was that, roughly, the period?

A. '70, 1970. Sewer down Detroit Street, Arbor, Macomber.

January 21, 1977, afternoon session  
Testimony of Herbert Glascock

MR. DANK: Would you on Exhibit 60 with this red pen draw an area showing the direction in which you were looking when the picture was taken.

MR. BEHRINGER: Did he take these pictures?

THE WITNESS: Yes.

THE COURT: And you are saying?

THE WITNESS: That tree right there is approximately where A is. That's where the pump was, at Detroit Street. It might be ten feet over, but it's within ten feet of that pipe.

THE COURT: You are saying that the large tree shown in Exhibit 61 was roughly in the area where A is shown?

THE WITNESS: That's correct.

THE COURT: On Exhibit 60?

THE WITNESS: That's correct. I was standing here and looking across these trees here. That branch that I have over there was taken from the top of these trees and the branch was taken from this oak right here, and that wedge was taken out of that tree right there.

Q. (By Mr. Dank, continuing): The branch I am going to show you has a tag on it labeled Exhibit 66?

A. That's the branch.

Q. It's taken from which tree?

A. From one of those trees right here.

THE COURT: In the foreground on the right in Exhibit 61?

THE WITNESS: That is correct.

THE COURT: All right.

MR. DANK: All right.

Q. (By Mr. Dank, continuing): Has that tree been partially covered with fill?

A. It was pushed over. That's why they're leaning at an angle. These trees weren't, but that tree, there was a tree there. They were pushed over right at the base of the fill.

Q. There seems to be a larger tree in the background of this picture. Could you tell whether or not that tree was alive or dead?

A. The tree was dead.

THE COURT: You are talking about the biggest one?

THE WITNESS: I'm talking about that oak tree right there. That's where that was taken out of.

Q. (By Mr. Dank, continuing): Now, you said that's what that was taken out of. You are referring to this tree here with bark on the outside?

A. Yes.

Q. It has that tag on it marked Exhibit 65?

A. That is correct.

Q. Did you personally remove that?

A. I removed that myself with the ants we found afterwards. I wasn't aware of it at the time.

THE COURT: We found another one today you know.

THE WITNESS: I wasn't aware of that.

THE COURT: It was dispatched.

Q. (By Mr. Dank, continuing): Do you have some experience with the common varieties of trees grown in Harrison Township?

A. Yes.

Q. Can you tell what kind of trees those were from which you took the leaf and the wedge?

A. That's an oak tree. We should have asked the biologists that were here. They probably have a better knowledge of the type, but they're both in the category of oak, which I guess there's about a dozen different oaks, but it's oak.

Q. Proceeding now to the map which you made on Exhibit 60, proceed to point B and tell us what that is.

A. That was taken—do you want me to use that red pencil again?

Q. Yes.

THE COURT: You are saying Exhibit 62?

MR. DANK: Exhibit 62 is a photo that was taken from that point.

THE COURT: Looking in which direction?

THE WITNESS: This was taken in this direction, roughly this location that we were just outside of Helzer—I mean outside of the fill area.

THE COURT: Which direction was the camera pointing when that picture was taken?

THE WITNESS: To the east.

THE COURT: Okay.

Q. (By Mr. Dank, continuing): As near as you could determine were those trees growing in the area that had been referred to here as the 20-acre parcel?

A. That is correct.

Q. And looking at Exhibit 59, which is on the board here, can you give us an indication from there about where those trees would be located?

A. I would say about here.

THE COURT: Whose map is that? We already marked that one up.

MR. DANK: Yes. That was Exhibit 59.

THE COURT: Have we marked this?

MR. DANK: No. That's what Mr. Bridges testified.

THE COURT: You don't have any objection, do you?

THE WITNESS: I have no objection.

THE COURT: Why don't you put a mark on it.

MR. DANK: Put trees from Exhibit 62.

THE COURT: Just put the number 62.

MR. DANK: 62.

THE COURT: And your initials. Okay. Thank you.

MR. DANK: All right. Proceed now then to Exhibit 63 point C on your map.

THE COURT: The view shown is C, is it?

THE WITNESS: That's correct.

THE COURT: The view shown in 62 is the area circled as C?

THE WITNESS: That is correct.

Q. (By Mr. Dank, continuing): Or is that the point you were standing at?

A. Well, in that vicinity, and I was facing the river road which is over here like that.

Q. All right. Can you describe for us what the objects are in there?

A. Soft maples.

Q. You are talking about the trees that are down?

A. The trees that are down. They were cut from this stump right here. They were lying there. I don't know why they reached so high to cut that one because he could have got a couple more logs out of it. Maybe he's going to do that yet.

THE COURT: The trees that you see in the background of that are where?

THE WITNESS: They're farther over toward River Road.

Q. (By Mr. Dank, continuing): Do you know what kind of trees they were?

A. These are soft maples.

Q. I am talking about the ones in the background.

A. I would say those are poplar.

Q. Poplar?

A. Poplar.

Q. Okay.

**January 21, 1977, morning session,  
Testimony of Fitz Bridges**

Q. Thank you. Mr. Bridges, we've been using Exhibits 37 throughout this hearing, I wonder if you would just briefly tell us what that exhibit is?

A. It's—this one over here on the blackboard? I mentioned previously in my summary, I was the township engineer from '60 thru '68, and worked with the Milliken laymen and I obtained—various maps to use in our programming and design of lateral and trunk systems first, and preliminary design of the lateral system. This is what they have indicated as their existing land use map. It shows different types of usage and ledging down below. Shows where existing homes were as of that date, time. This was produced in '67 when I got it. I've indicated on this map in red outlining the area flown by, Riverside Bayview Homes Incorporated, 20 acres, plus lots in the subdivision. Then I've indicated in an orange color here, lands that are made lands. This information is from personal knowledge, but these actually, lines were taken from Macomb County Soil Book. I don't know whether that's been—

THE COURT: That's all right. You have personal knowledge and the book was published by Macomb County.

A. Department of Agriculture and that's indicates—

Q. Exhibit 28—

A. That indicates the various types of soil in the county and by aerial photographs and it also indicated in this particular area. I've also made a composite photograph of it, the land with MD on it, which indicated made land, and I know that this was dredged and filled to elevation 580, at the time they were filling the Metropolitan Beach. We were instrumental, we developed this piece of land right here, and filled that. This land was filled in 1925, 26. My clients filled this land. I designed by the subdivision up here, back in the 1917's, 1918, when Selfridge field was under construction. This area was filled, and there's been other areas filled since Selfridge was expanded. Selfridge is diked all the way around. There's a dike all the way around Selfridge, so even though there

may be high water, they can pump water out of it. All this land is indicated as made land. Mr. Schley indicated he lived on Pallot Street. I didn't continue on down there. We're pretty much surrounded by made land in here. This is a marina in here. Land surrounding is made, filled land.

Q. All right. Mr. Bridges—

THE COURT: Can I ask you one question. Now, you were there before they built Metropolitan Beach, I take it?

A. Yes.

THE COURT: Did you look at these photographs that had two canals, it looks like?

A. 1948?

THE COURT: Well—

A. I didn't officially Macomb County until 1946.

THE COURT: I can't find the photos, just to confirm that there were canals there. I guess we agreed that they were, but—

A. I'm quite familiar with the photographs.

MR. DANK: Here's 40.

THE COURT: Give him one of the 40's.

MR. DANK: I'll give you the 40's and 37's.

THE COURT: 11-3-40. These two lines, here.

A. Let me see, now. These lines—there is a —well, peak of the canals that we're involved in, this is Jefferson—

THE COURT: Right there?

A. Yes, Metropolitan Parkway now comes a—right about in this location.

THE COURT: Across here?

A. This canal is, is about the two ten acres parcels south of our property. This canal, if I could correlate that with the other Exhibit 69. This canal is the one that you see there.

THE COURT: I understand that. I just want to know where the other two were that aren't there anymore?

A. This canal right here—these lines in here, are now in Metropolitan Beach, but I believe these lines have been added to the negatives of the photographs. These are not actually canals. I was not living in Macomb County in 1940. I was on the beach property before and during the filling, and I don't recall any canals in there.

THE COURT: Okay.

A. In 1937, the photograph without the addition of the lines, they do show a canal.

THE COURT: They must have been there.

A. Yes, but I wasn't out there in '37. I started coming to Mt. Clemens in 19—no, I don't believe I was there in '37.

THE COURT: At least not to know that?

A. No, but these I think have had some lines added to it.

January 21, 1977, afternoon session,  
Testimony of Thomas P. Gough

Q. Are there other charts in this book that will enumerate the characteristics of Lamson type soils?

A. Yes, there are.

Q. Can you tell us what pages those charts appear on?

A. I refer to Table 2, which deals with agriculture.

THE COURT: What page are you on?

THE WITNESS: This will be on Page 59. This is the predicted average yields per acre of crops. Now, on that if you go down to Lamson fine sandy loam, it will indicate two levels of management of the soil, what they call management A and B. A was without any special practices being applied, and the B table refers to a better job of conservation.

For instance, on Lamson you would install artificial drainage. You'll see that in Lamson it would produce 45 bushels of corn and corn for drain in its natural condition, and if it were improved by drainage, you would go up as high as 95 bushels, and you go across the page showing the same thing for the main crops that are raised in Macomb County. This would be in reference to what I was talking about that there are Lamson soils out in other parts of the county. Then there's another table dealing with—

Q. Let me just stop you for a moment and let me ask you this: In comparison to other soils that are found in Macomb County, do you find the Lamson types to be ordinarily high yield type soils?

A. No, they're not the highest. They would be about medium compared to the other soils. The very droughty, dry soils in the sand ridge over on the west side of the county would have low production, and the better lake bed soils like Conover and Parkhill soils up in the Richmond area, up in the northeast end of the county would be the highest production. So the Lamson soils would fit in about medium in production, along with some of the other similar soils, Metea, Granby and a few others.

Q. Thank you. Are there other charts?

A. Another table would be Table 3 dealing with wildlife.

THE COURT: What page?

THE WITNESS: The page on that would be Page 66. On this table it lists the suitability for various elements of wildlife habitat and the kind of wildlife that you would expect on this kind of a soil. As you read across the Lamson you'd find it's listed—now, this is under natural conditions, not artificially drained, just natural conditions. It would be poorly suited for grain and seed crops, but it would be suited for grasses, wild herbaceous upland plants, hardwoods, conifers, wetland food and cover. It would be well suited there. It would be well suited for shallow water developments, excavated pines and then openland wild fields and woodland and wetland wildlife. It would be suitable for all of them.

Q. Would this be true whether or not it was located within the near proximity to a navigable water?

A. Yes, it would.

Q. For instance?

A. This would be true of the soil where you found it in Macomb County.

Q. For instance, that is up in Shelby Township?

A. Section 6 of Shelby Township, yes, just south of 26 Mile Road.

Q. That's on the west side of the county?

A. Yes, the west side. It's a half mile from the west county border, next to Oakland County.

Q. All right.

A. There is another table, too, if you want to go a little further in engineering. There's another table on Page 86 or 84 that tells you the suitability of this soil for various uses and some soil features affecting this use. For instance, its suitability for topsoil, a source of topsoil would be pretty good, but it's not suitable for sand or gravel, and it would be poor material for a road fill. It would be fair for impermeable material for building a dike or a dam, and

then the features affecting it, the high water table would affect the use for highway or for foundation for a low building or for winter grading. This would be strictly because of the high water table.

In other words, these are limitations so that any use that would be made of this soil should take these things into consideration. There are limitations, but there are methods of overcoming these bad capabilities, if you will.

Supreme Court, U.S.

FILED

OCT 2 1985

JOSEPH F. SPANIOL, JR.

CORR

No. 84-701

# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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**REPLY BRIEF FOR THE UNITED STATES**

I. In its attempt to convince the Court that the government's position in this case would, in the words of the court of appeals, lead to federal regulation of "low lying backyards miles from a navigable waterway" (Pet. App. 21a), Riverside makes a number of factual misstatements and incomplete statements that require correction and clarification. We briefly address these matters before turning to Riverside's legal arguments.

A. First, Riverside asserts (Br. 4) that its property is "ringed on all four sides by paved public streets and fully developed urban areas." Preliminarily, we note that even if Riverside's assertion were correct, it would be irrelevant, because the presence of "man-made dikes or barriers" does not defeat the Corps' jurisdiction over wetlands adjacent to "waters of the United States."

33 C.F.R. 323.2(d). (We also note that many of the Great Lakes are "ringed on all sides by paved public streets," including interstate highways. Certainly, Riverside would not contend that this fact negates their status as "waters of the United States" under the Clean Water Act.) More important, however, is the fact that there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. Black Creek in turn flows into Lake St. Clair, and that lake connects directly with the Great Lakes Erie (to the south) and Huron (to the north). Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes. This statement is documented by an aerial photograph and a topographic map of Riverside's property (PX 1 (J.A. 118); PX 23 (S. Ct. Exh. 4), reproduced in part at App., *infra*) that accurately reflect the true location of the four "paved public streets and fully developed urban areas."<sup>1</sup> As these exhibits demonstrate, the property touches paved streets on only two sides. The northern boundary of the property (*i.e.*, the boundary of the upland portion over which the Corps does not assert jurisdiction (see Gov't Br. 45)) abuts South River Road, which runs roughly parallel to the Clinton River. The western boundary of the property

<sup>1</sup> The exhibits in this case are in considerable disarray, apparently because the district court clerk's office misplaced them for a number of years. It is our understanding that they were never sent to the court of appeals, and that court appears to have decided the case without benefit of any of the exhibits. When the government requested the transfer of the exhibits to this Court, the district court clerk's office was unable to locate all of them, and thus this Court does not have all of the exhibits in the case. Additional confusion has been generated by the fact that the district court clerk's office renumbered the exhibits it did have before transmitting them to

runs along Jefferson Avenue. The southern portion of the property is, on the other hand, bounded not by a paved street but by more wetlands (see also Pet. App. 24a). The road south of those wetlands, the Metropolitan Parkway, is some 1300 feet south of Riverside's property. Finally, and of greatest significance, is the location of the north-south road to the east of Riverside's property, Venetian Drive. Between the eastern boundary of Riverside's property and that road lie some 3300 feet of additional wetlands. Moreover, at its southern terminus, Venetian Drive dead ends at Black Creek; it does not connect with the Metropolitan Parkway's eastern terminus. Stated differently, the "ring of paved public streets" is unmistakably broken, permitting direct access across Riverside's wetlands and wetlands owned by others to Black Creek through a sizeable outlet of open water (not merely a marsh) that does not require crossing "paved streets," man-made dikes or drains, or any other feature relied upon by Riverside to convey the impression that its property is unconnected to any navigable water.<sup>2</sup>

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this Court. In some instances, it is not possible to determine the former exhibit number, thus making it difficult to correlate the trial testimony with particular exhibits. Where correlation is possible, we shall employ a parallel citation form, citing first to the original exhibit number at trial and, in parentheses, to the new number assigned to the exhibit in this Court.

In any event, it is our view that the most informative exhibits are PX 1 and PX 23 (S. Ct. Exh. 4), and these exhibits are reproduced, respectively, at J.A. 118 and App., *infra*. PX 23 (S. Ct. Exh. 4) is a USGS topographic map of the quadrangle that includes Riverside's property; to make reproduction possible in this brief, we have cropped the map to delete those portions of the quadrangle that are quite distant from Riverside's property.

<sup>2</sup> PX 23 (S. Ct. Exh. 4) was made in 1968 and revised in 1973, with the revisions shown in purple (App., *infra*). The southern portion of Riverside's property, over which the Corps asserts jurisdic-

B. Riverside also asserts (Br. 4, 31) that its property was actively farmed for close to 60 years, or until 1955. In addition to the fact that historic use is irrelevant to a current determination of wetlands jurisdiction, the record citation that Riverside relies upon does not bear out its contention. The witness, who was 75 years old at the time of trial (1/21/77 Tr. 3), testified that he saw corn on the property when he was about 10 years old (*id.* at 6). Thereafter, he testified only that he and his father cut hay on the property during World War II (*id.* at 7); he did not testify to any other farming activity occurring at that time or at any subsequent time.<sup>3</sup> Although there is some evidence that row crops were cultivated on the property as late as 1940 (J.A. 31; 1/21/77 Tr. 99-101), the only "agricultural" activity on

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tion, as well as the surrounding wetlands to the south and east, is dotted with the topographer's symbol for marshes. App., *infra*; 1/15/77 Tr. 167-168. Thus, Riverside's contention (Br. 31) that flood protection activities undertaken by the Corps in 1973 are responsible for creating the wetland conditions that now dominate its property is totally contradicted by the abundance of marsh symbols on the 1968 topographic map and the absence of any revisor's changes to the map in 1973. See also Gov't Br. 47-48 n.41. It is also worth noting that a USGS map prepared in 1952 (PX 22 (S. Ct. Exh. 17)) likewise shows marsh symbols all over the southern portion of Riverside's property (see also J.A. 43-44).

<sup>3</sup> Riverside also cites (Br. 4) to DX 25, 26, and 27, in support of its assertion that the property was actively farmed until at least 1955. Unfortunately, these exhibits are not available to the Court; they appear to be among the exhibits lost by the district court clerk's office. To the best of our knowledge, all three exhibits are Department of Agriculture aerial depictions of the property, one made in 1940 and the other two in 1955. Without the exhibits themselves, it is of course impossible to ascertain what they show about past uses of the property. We note, however, that there was testimony at trial that only DX 26, the 1940 depiction, suggested the possibility of farming activity. The quality of DX 25 and 27 (the 1955 depictions), on the other hand, was too poor to indicate what use was being made of the property (1/13/77 Tr. 51-52).

the property in the 1950s was the mowing of grass (J.A. 87; see also 1/21/77 60-61 (no agricultural use of the property since at least 1951)). To our knowledge, mowing grass does not constitute farming. In any event, farming, be it mowing grass, cutting hay, or more traditional agricultural activities, is not inconsistent with the status of the property as a wetland covered by Section 404. J.A. 37, 59-60. Indeed, the evidence shows that, notwithstanding the very limited farming activities in the distant past, the property has been a wetland since at least 1873 (J.A. 17-18; 1/15/77 Tr. 153-155) and has been consistently used for trapping and hunting muskrats and waterfowl and for spear fishing by bow and arrow (see, e.g., J.A. 51-54, 64-71).

C. Riverside further asserts (Br. 4) that the portions of the property that were not farmed were heavily wooded by oak and maple trees that are still in existence today. Riverside's record citation for this contention is the confusing testimony of one witness that he observed one dead oak tree and another tree that may or may not have been an oak but had been pushed over by prior filling activities (Resp. Br. App. 3a-4a). In addition, the cited testimony suggests that the dead oak tree and the other unidentified tree were located on the upland portion of Riverside's property, over which the Corps does not assert jurisdiction. In any event, none of the maps and photographs in the record suggests that the property (with the possible exception of a very small area in the northern, upland portion) is heavily wooded. Finally, the maple trees on Riverside's property are a wetland species of vegetation. J.A. 33, 56.

D. Riverside also contends (Br. 31) that its property is partially developed with sidewalks, sewers, and fire hydrants. The only testimony in the record with respect to sidewalks is that of George Short, the sole owner of Riverside Bayview Homes, Inc., to the effect that sidewalks were "down on Macomber Street" when the

property was platted in 1916 (J.A. 85). Riverside neglects to point out, however, that Macomber Street runs only through the upland portion of its property not covered by Section 404 (see PX 23 (S. Ct. Exh. 4), App., *infra*); nothing in the record suggests that there are any sidewalks on the wetland portion of the property. With respect to sewers and fire hydrants, the record contains testimony that the filling operation that would be necessary for Riverside to carry out its development plans would bury the sewers and fire hydrants, thereby rendering them useless (see 1/17/77 Tr. 64 ("[I]f they filled this area, they would have to extend the fire hydrants and manhole covers up in the air.")). The record also contains testimony that the fire department has been unable to put out marsh fires on Riverside's property because the area was too muddy for the fire trucks to enter (1/21/77 Tr. 61-63).

E. In short, as we explained in our opening brief (at 44-48), the southern portion of Riverside's property has exhibited the wetland characteristics of aquatic vegetation and saturated (sometimes flooded) conditions for decades (J.A. 56, 64-65, 70; 1/15/77 Tr. 59), and the visual evidence before this Court (J.A. 118; App., *infra*) demonstrates beyond cavil that the property is adjacent to navigable waters of the United States. Riverside's contention that its property is nothing more than an "unconnected low-lying area[ ]" (Br. 38) is totally contradicted by the evidence of record.

II. A. Riverside contends (Br. 22) that the term "navigable waters" as used in the Clean Water Act refers only to "the navigable waters of the United States, non-navigable portions of those waters and tributaries." According to Riverside (*ibid.*), the only "wetlands" that Congress intended to regulate under the CWA are those that "constitut[e] part of the foregoing waterbodies." Reduced to its essentials, Riverside's

argument amounts to a contention that Congress did not intend to regulate adjacent wetlands at all, because such wetlands, by definition, are not part of any of the enumerated water bodies, but are instead the marshes, swamps, and bogs *adjacent* to those water bodies.<sup>4</sup> In light of the legislative history of the 1977 amendments to the CWA, this contention is untenable (see Gov't Br. 22-27 and pages 13-14, *infra*).

Riverside's confusion clearly stems from its erroneous assumption (Br. 16-22) that those waters subject to federal regulatory control under the Commerce Clause are the same as, and no broader than, those waters subject to federal regulation for the purpose of protecting or improving navigation. But this Court has clearly recognized that the limits of Congress's Commerce Clause powers are in no way circumscribed by factors relating to navigation. See *Kaiser Aetna v. United States*, 444 U.S. 164, 171-174 (1979). As the Court there stated (*id.* at 174 (emphasis added)), "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause *irrespective of whether navigation, or, indeed, water, is involved.*" In this case, therefore, Riverside's reference to the waters regulated by the United States for purposes of navigation sheds no light on congressional intent with respect to the areas—be they traditional waters or wetlands—

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<sup>4</sup> Although the Section 404 program also encompasses "isolated" wetlands, *i.e.*, wetlands such as prairie potholes (see *North Dakota v. United States*, 460 U.S. 300, 304 n.4 (1983)), the regulatory standards for the Corps' assertion of jurisdiction over isolated wetlands differ from those applicable to adjacent wetlands. See 33 C.F.R. 323.2(a)(2), (3), and (7). This case, however, does not involve the regulation of "isolated" wetlands; instead, the Corps asserts jurisdiction over Riverside's property on the basis of its "adjacency," or geographic proximity, to open water bodies. See pages 10-11, *infra*.

that Congress intended to regulate when exercising its Commerce Clause powers to their “constitutional limit” (see, e.g., 118 Cong. Rec. 33699 (1972); S. Rep. 95-370; 95th Cong., 1st Sess. 75 (1977)). Indeed, one would have to make the wholly unwarranted and truly fanciful assumption that Congress was unaware of the broad sweep of its regulatory powers under the Commerce Clause in order to accept Riverside’s contention that Congress believed the full extent of its constitutional power over water was in any way circumscribed by the interests of navigation.

Moreover, conspicuously absent from Riverside’s enumeration of the waters it believes Congress intended to regulate is any attempt to correlate those waters with the purposes of the Clean Water Act. It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, e.g., *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983). As we demonstrated in our opening brief (at 19-27, 33-39), the Corps’ definition of wetlands, which attaches no significance to the source of water inundating or saturating an area characterized by wetlands vegetation, is fully consistent with both congressional and scientific understanding of the many valuable services performed by wetlands. See also *id.* at 25 n.17.

Riverside’s only response to these concerns is to argue that the government is seeking “to expand the CWA into the equivalent of a national wetlands preservation act” (Br. 42). But the legislative history of the 1977 amendments to the CWA unequivocally demonstrates congressional recognition of the importance of wetlands. Congress clearly understood that wetlands adjacent to large areas of open water such as Lake St. Clair perform vital hydrologic support functions in the aquatic ecosystem, including natural drainage, organic

and mineral nutrient exchange, sedimentation control, flushing, water purification, provision of diverse fish and waterfowl habitat required for all stages of life cycles, water current control, and flood water storage. See, e.g., 123 Cong. Rec. 26697 (1977) (remarks of Sen. Muskie); *id.* at 26718-26719 (remarks of Sen. Baker); Institute for Water Resources, U.S. Army Corps of Engineers, *Research Report 79-R1, Wetland Values—Concepts and Methods for Wetlands Evaluation* (1979) [hereinafter cited as *Wetland Values*]. And to the extent that federal regulation of wetlands may produce an incidental effect on local land use decisions (see Resp. Br. 43), that result is merely a necessary by-product of Congress’s decision to control discharges into waters of the United States, including wetlands. It no more invades the province of the states than does implementation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 283-293 (1981).<sup>6</sup>

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<sup>6</sup> Riverside’s additional argument (Br. 43-44 & n.46) that Congress intended federal jurisdiction over wetlands to be construed narrowly because it wanted to leave wetland regulation entirely to the states is all the more unsound in light of Section 404(g)(1) of the CWA, 33 U.S.C. 1344(g)(1). In that Section, Congress expressly specified the maximum extent to which it was willing to empower the States to administer the Section 404 program, including wetland regulation. Judicial creation of a greater role for the states would completely rewrite the statute. (We note that the decision of 20 states, including Michigan, to support the United States in this case as amici curiae further belies Riverside’s argument.)

Finally, the fact that wetlands may be adversely affected by activities not regulated under Section 404 and the existence of other federal programs that provide different types of protection for wetlands than does Section 404 (see Resp. Br. 45) do not support Riverside’s argument for a narrow construction of Section 404. Riverside cites no authority for the proposition that Congress must address every facet of wetlands protection in a single statute; indeed, the existence of multiple statutes dealing with wetlands only underscores the importance that Congress attaches to their protection.

B. Riverside and its amici argue that the court of appeals' "frequent flooding" test will ensure the presence of a "hydrologic connection" between traditional water bodies and those adjacent wetlands that Congress may have intended to regulate under Section 404. This is true enough, but it should be obvious that "frequent flooding," which was never mentioned in the legislative history of the 1972 Act or the 1977 amendments and is nowhere to be found in the Corps' regulations, is not the only means by which to establish such a "hydrologic connection."

Although we disagree with the extremely narrow concept of "hydrologic connection" espoused by Riverside and its amici, we do not take serious issue with the proposition that wetlands, to be considered "adjacent" to a water body (see 33 C.F.R. 323.2(d)), should have some functional relationship with the water body. But that relationship may take any number of forms, including "frequent flooding," a visible surface water connection, a ground water connection, or, more generally but equally pertinent, an areal relationship that recognizes the interrelated nature of all waters, including wetlands, in a single aquatic ecosystem. *Wetland Values* 26-27. (By a single aquatic ecosystem, we mean all waters, including wetlands, within a geographically proximate hydrologic regime that support interrelated and interacting communities of plants or animals (see 40 C.F.R. 230.3(c)).

Precise quantification of the relationships within an aquatic ecosystem and the relative importance of particular wetlands requires highly sophisticated techniques and instruments beyond the scope of most threshold jurisdictional inquiries conducted by the Corps. *Wetland Values* 26. See also Fish & Wildlife Service, U.S. Dep't of the Interior, *Classification of Wetlands and Deepwater Habitats of the United States*

23 (1979) (technical data describing hydrologic characteristics of water regimes, including wetlands, is seldom available). Accordingly, the Corps invokes the concept of "adjacency" as a regulatory tool to identify waters in the same aquatic ecosystem; stated differently, the Corps employs a sort of administrative presumption that a wetland in close geographic proximity to an open water body affects interstate commerce by virtue of its relationship to that water body and is therefore within the class of wetlands that Congress intended to regulate. On the other hand, no such presumption attaches in the case of "isolated" waters, including wetlands; in such cases, the Corps assumes the case-by-case burden of demonstrating that the use, degradation, or destruction of isolated waters, including wetlands, could affect interstate commerce (33 C.F.R. 323.2(a)(3)).

The regulatory classification of wetlands into the categories of "adjacent" and "isolated" is an essential tool for the effective implementation of the statute. As noted, establishing a hydrologic connection is often a time-consuming and expensive process.<sup>6</sup> Were the

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<sup>6</sup> Riverside takes issue (Br. 32-33) with our position (Gov't Br. 40-44) that an easily-applied threshold test for Section 404 jurisdiction benefits both landowners and regulators alike, contending that wetlands determinations are inherently difficult and that satisfying the court of appeals' "frequent flooding" requirement therefore adds nothing to the complexity of a wetlands determination. In fact, however, the Corps' draft manual, U.S. Corps of Engineers, Dep't of the Army, *Wetlands Delineation Manual*, Doc. No. Y-84 (Draft 1985) (upon which Riverside relies for its claim of complexity), has not been officially adopted by the Corps, does not even address the issue of hydrologic connections, and, more importantly, states that "[i]n most cases, the combination of available office data and relatively simple, rapidly applied, onsite methods will be sufficient" to make a wetlands determination. *Id.* at 48. These methods "usually [do] not require collection of quantitative data" of the sort that so perplexed the district court (See Pet. App. 25a-31a). *Delineation Manual* at 112.

Corps forced to abandon the logical presumption inherent in the adjacency test at the threshold jurisdictional stage, many wetlands that Congress intended to regulate could be destroyed before the Corps had an opportunity to evaluate the impact of a particular proposal during the permit review process. In this case, for example, Riverside refused to comply with a cease and desist order issued by the Corps, and the United States was forced to seek a temporary restraining order and a preliminary injunction to halt Riverside's fill operation until the Corps could evaluate Riverside's proposal.<sup>7</sup> In this and other enforcement actions, refusal to permit the Corps to engage in a presumption of a hydrologic association and an interstate commerce nexus based on adjacency clearly would thwart Congress's goals.

The Corps recognizes, however, that not every wetland performs equally important environmental functions. Even "adjacent" wetlands vary in their environmental significance, depending on a number of variables. *E.g., Wetland Values* 27. These variables are fully considered in the permit review process (see, e.g., 40 C.F.R. 230.6(a), 230.10(b)-(d), 230.11). To require their consideration and definitive resolution earlier, at the threshold jurisdictional stage, would, as noted,

<sup>7</sup> Riverside complains (Br. 32) that the permit review process itself is burdensome and time-consuming. Riverside's own case, however, which began with the submission of an incomplete application, is not typical. The Corps advises us that the average time for processing permit applications is currently 70 days. Nevertheless, burdens on individual permit applicants are of concern to the Corps, and, pursuant to 33 U.S.C. 1344(q), the Corps has adopted various measures to streamline interagency review of permit applications. Finally, a substantial number of actions that would otherwise require individual Section 404 permit applications are instead automatically authorized by "general" permits issued by regulation. See 33 U.S.C. 1344(e)(1); 33 C.F.R. Pt. 330.

result in the unwarranted degradation or destruction of many environmentally significant wetlands. Accordingly, the Corps' "adjacency" regulation, as broadly defined above in accordance with sound scientific principles, should be upheld as a reasonable administrative approach to Riverside's "hydrologic connection" argument.<sup>8</sup>

C. As we demonstrated in our opening brief (at 22-25), Congress in 1977 clearly ratified the Corps' interpretation of its jurisdiction under Section 404. While Riverside correctly notes (Br. 35-36) that Congress was dissatisfied with certain aspects of the Corps' Section 404 program, it ignores the fact that Congress engaged in a comprehensive reexamination of every facet of that

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<sup>8</sup> It is important to note that the outer limits of what may properly constitute a "hydrologic connection" need not be defined in this case. The maps and photographs of record (PX 1 (J.A. 118); PX 23 (S. Ct. Exh. 4), App., *infra*) clearly demonstrate an open water connection between Riverside's marsh and the navigable waters of Black Creek. Using any sensible approach to the problem, this connection clearly satisfies the "hydrologic connection" requirement urged by Riverside. Moreover, the district court's finding that there was no hydrologic connection between Riverside's property and the adjacent water bodies (Pet. App. 32a-37a) clearly referred *only* to the absence of a *subsurface* flow from the adjacent water bodies to Riverside's property. Whether or not this finding is clearly erroneous (as we suspect it is) is irrelevant in the face of the visible surface water connection. See also Gov't Br. 8 n.7.

Finally, it should be noted that the Corps has discarded proposed regulations (48 Fed. Reg. 21474 (1983)) that would have amended the definition of "adjacent" to require, in addition to geographic proximity, "a reasonably perceptible [sic] surface or subsurface hydrologic connection to a water of the United States." The proposal was abandoned in the face of adverse comments, particularly from EPA (which bears ultimate administrative responsibility for defining "waters of the United States"). The commentors feared that the Corps' proposal would be read too narrowly, so as to exclude from the "hydrologic connection" concept those geographically proximate wetlands that perform the functions of concern to Congress even in the absence of a readily-ascertainable surface or subsurface connection to open water bodies.

program and decided to cure the objectionable features by exempting specific *activities* from Section 404's permit requirements; on the other hand, Congress expressly declined to adopt an amendment to limit the Corps' interpretation of the *geographic* reach of Section 404. Congress understood exactly what it was doing (cf. *Heckler v. Day*, No. 82-1371 (May 22, 1984), slip op. 7-12); it unequivocally rejected the interpretation urged by Riverside. Contrary to Riverside's argument (Br. 36), therefore, this case does not involve an ordinary claim of legislative acquiescence through silence, nor is it simply a case of reliance on post-enactment remarks by individual legislators.<sup>9</sup>

D. As we have demonstrated here and in our opening brief, the Corps' regulations reasonably interpret congressional intent, and the court of appeals erred in substituting its own construction of the statute and the regulations for that of the agency. Riverside's response is to argue (Br. 29) that no deference is due the Corps' interpretation because it has not been consistent. Notably, Riverside never acknowledges that the ultimate administrative responsibility for defining

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<sup>9</sup> Equally without merit is Riverside's suggestion (Br. 36-37 n.39) that congressional ratification of the Corps' program, if any, was limited to the Corps' 1975 interim final regulations and did not encompass the final regulations promulgated in 1977. The 1977 regulations were promulgated before the pertinent legislative debates, and Congress was aware of those regulations (see, e.g., Gov't Br. 24). In any event, Riverside erroneously argues (Br. 37 n.39) that the 1975 regulations encompassed only those freshwater wetlands created by periodic inundation from a contiguous or adjacent navigable water. This interpretation is not traceable to the 1975 regulatory language, and the 1975 regulations were never so construed by the Corps. As with the 1977 regulations, the Corps' position was that the source of water—be it overflow from adjacent water bodies, rainwater, ground water, or storm water runoff—was irrelevant. See Affidavit of William N. Hedeman, Jr. (Dist. Ct. Docket Entry No. 14).

"waters of the United States" rests with EPA (see Gov't Br. 18 n.11), and that agency has demonstrated unwavering consistency in its interpretation and implementation of the CWA. Moreover, the only "inconsistency" on the part of the Corps was rectified in response to the order in *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (see Gov't Br. 5-6); since that time, the Corps has never deviated from the interpretation of the CWA it advances in this Court. Indeed, it is only by blinding itself to any distinction between proposed regulations and duly promulgated final regulations that Riverside is able to advance its claim of "inconsistency" on the part of the Corps. But the notion that an agency's interpretation of a statute is undeserving of deference whenever it makes changes to proposed rules undermines the very purpose of notice and comment rulemaking. In any event, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron U.S.A. Inc. v. NRDC*, No. 82-1005 (June 25, 1984), slip op. 25.

III. Finally, Riverside argues (Br. 41, 46-50) that if the CWA *does* permit the regulation of "adjacent wetlands" as defined by the Corps, then the Act is an unconstitutional delegation of legislative functions and violates the Takings Clause of the Fifth Amendment. Neither contention has any merit.<sup>10</sup>

A. Congress may constitutionally delegate to an administrative agency the responsibility for effectuating

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<sup>10</sup> Riverside never raised the delegation argument in the lower courts, and those courts had no occasion to pass on it. Accordingly, this Court should decline to consider the issue. See, e.g., *County of Oneida v. Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 16-17.

legislative policy so long as it sets general standards sufficient to provide the agency with an intelligible principle for guidance. See, e.g., *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976); *Carlson v. Landon*, 342 U.S. 524, 542-544 (1952). Congress's delegation of authority to the Corps (and the EPA) under the CWA easily satisfies this test. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 916 (5th Cir. 1983).

In determining whether Congress has provided sufficient standards, it is appropriate to look to statutory context and legislative history to add gloss to a broad grant of legislative authority. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 675-676 (1980) (Rehnquist, J., concurring). The stated goals of the CWA (restoration of the integrity of the Nation's waters and elimination of discharges of pollutants into those waters, 33 U.S.C. 1251(a)), the legislative history's guidance that "waters of the United States" be construed to the constitutional limit to accomplish those goals, and the 1977 legislative history relating specifically to Section 404 collectively provide an intelligible standard to guide the Corps' assertion of regulatory jurisdiction.<sup>11</sup> This Court has recognized

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<sup>11</sup> The Corps' promulgation of regulations defining "waters of the United States" does not warrant the conclusion that an unconstitutional delegation has occurred. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron U.S.A. Inc. v. NRDC*, slip op. 5 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Furthermore, it is immaterial that such gap-filling regulations clarify a term that determines jurisdiction under the Act. See *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303-304 (1977); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944).

With respect to the Corps' authority to grant or deny permits, which Riverside also suggests (Br. 41) is an unconstitutional

that "[n]ecessity . . . fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe detailed rules." *FEA v. Algonquin SNG, Inc.*, 426 U.S. at 560 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). The specificity demanded by Riverside would exceed that point, and its delegation argument should be rejected.

B. Riverside's argument that the Corps' assertion of regulatory jurisdiction over wetlands of the type found on its property amounts to an unconstitutional taking of private property reflects a failure to distinguish between the mere assertion of regulatory jurisdiction over wetlands and the decision to grant or deny a permit. This Court recently reaffirmed the principle that taking claims are premature until a landowner receives a final decision regarding how or whether he will be permitted to develop his property. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 17. The Court also reaffirmed the principle that taking claims against the federal government are premature until the landowner has availed himself of the process for seeking just compensation provided by the Tucker Act, 28 U.S.C. 1491. *Williamson County*, slip op. 20-21. Riverside has not done so.

Accordingly, the proposition (Resp. Br. 16, 50) that a statute susceptible to more than one interpretation should be construed so as to avoid a taking of private property is inapposite here. In *United States v. Security Industrial Bank*, 459 U.S. 70, 77-78, 82 (1982), the Court concluded that Congress did not intend to apply a provision of the Bankruptcy Code retroactively in part because, if it were so applied, the statute would effect a

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delegation of legislative power, the CWA sets forth quite specific criteria. See 33 U.S.C. 1344(b); 33 U.S.C. 1343; *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 916; Gov't Br. 21 n.12.

taking *on its face* for *private* purposes. Here, on the other hand, the assertion of CWA jurisdiction merely triggers a permit requirement for certain polluting activities, not a taking of any property right.

In an attempt to overcome the problems with its taking argument, Riverside asserts (Br. 48) that a determination of wetlands jurisdiction is invariably tantamount to a permit denial.<sup>12</sup> Riverside grossly misrepresents reality by its claim (Br. 49) that “[t]he criteria contained in the Corps’ regulations relative to the granting of a permit in a wetland area assure that a permit will be denied.”<sup>13</sup> Riverside apparently bases this misstatement on its erroneous assumption (Br. 48) that the Section 404 regulations effectively require the

<sup>12</sup> At the same time, Riverside recognizes (Br. 49), as it must, that the determination whether a permit denial amounts to a taking requires a factual inquiry. Thus, Riverside’s taking argument must be rejected for the additional reason that it can point to no evidence supporting its assertion (*ibid.*) that without a permit there is no alternative economic use of its property; there simply was no inquiry in the courts below into possible alternative uses of Riverside’s property. Riverside’s assertions (Br. 47-48) that the only use for the wetlands portion of its property is as a housing subdivision and that agricultural use is neither economically viable nor compatible with the site improvements (*i.e.*, the sewers and fire hydrants discussed at pages 5-6, *supra*) are totally without record support.

<sup>13</sup> In fact, only a small number—approximately 2.7%—of all Section 404 permit applications are denied. Office of Technology Assessment, Congress of the United States, OTA-O-206, *Wetlands: Their Use and Regulation* 143-144 (1984). The Corps grants 50% of Section 404 permit applications without significant modification, and 33% are granted with substantial modifications intended to reduce adverse project impacts. *Id.* at 12. In 1980-1981, the Corps authorized projects that resulted in the conversion to other uses of about 50% of the wetlands acreage for which permits were sought. *Id.* at 11, 144-145.

denial of a permit for any project that does not need to be located in, or in close proximity to, the aquatic environment.

In fact, an applicant for a nonwater-dependent activity covered by Section 404 may instead show a lack of environmentally preferable practicable alternatives (33 C.F.R. 320.4(b)(4); 40 C.F.R. 230.10(a)); the showing required is inversely related to the degree of potential adverse impact from a proposed activity (see 40 C.F.R. 230.6(a)). Although a permit application for a nonwater-dependent activity necessitates a more persuasive showing regarding the lack of alternatives than does an application for a water-dependent activity, this distinction imposes only a heightened factual burden. For example, in *Louisiana Wildlife Federation v. York*, 761 F. 2d 1044, 1047-1048 (5th Cir. 1985), the court of appeals approved the Corps’ issuance of permits allowing the conversion of 5,200 acres of wetlands to agricultural use (a nonwater-dependent activity), notwithstanding a claim that the permit applicants had failed to make the necessary showing concerning the lack of alternatives. The court held that under the Corps’ regulations and EPA’s guidelines, the Corps was permitted, and indeed had the duty, to consider the objectives of the project and the economic feasibility and logistics of alternatives. 761 F.2d at 1048. See also *Hough v. Marsh*, 557 F. Supp. 74, 83 (D. Mass. 1982) (finding of water dependency is not a prerequisite to filling wetlands under Section 404, but it is a factor to be considered in the application process). On this record, therefore, there is no support for Riverside’s argument that the mere assertion of regulatory jurisdiction amounts to a taking.

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES FRIED  
*Acting Solicitor General*

OCTOBER 1985

APPENDIX

# MT. CLEMENS EAST, MICH.

SE 4 MT. CLEMENS 15 QUADRANGLE  
N4230 - W8245 - 7.5

1968

PHOTOGRAPHIC MAP  
AMS 4469 III SE - SERIES V862



Mapped, edited, and published by the Geological Survey  
in cooperation with State of Michigan agencies

Control by USGS, USC&GS, and U. S. Lake Survey

Planimetry by photogrammetric methods from aerial photographs  
taken 1951. Topography by planetable surveys 1952. Revised from  
aerial photographs taken 1967. Field checked 1968

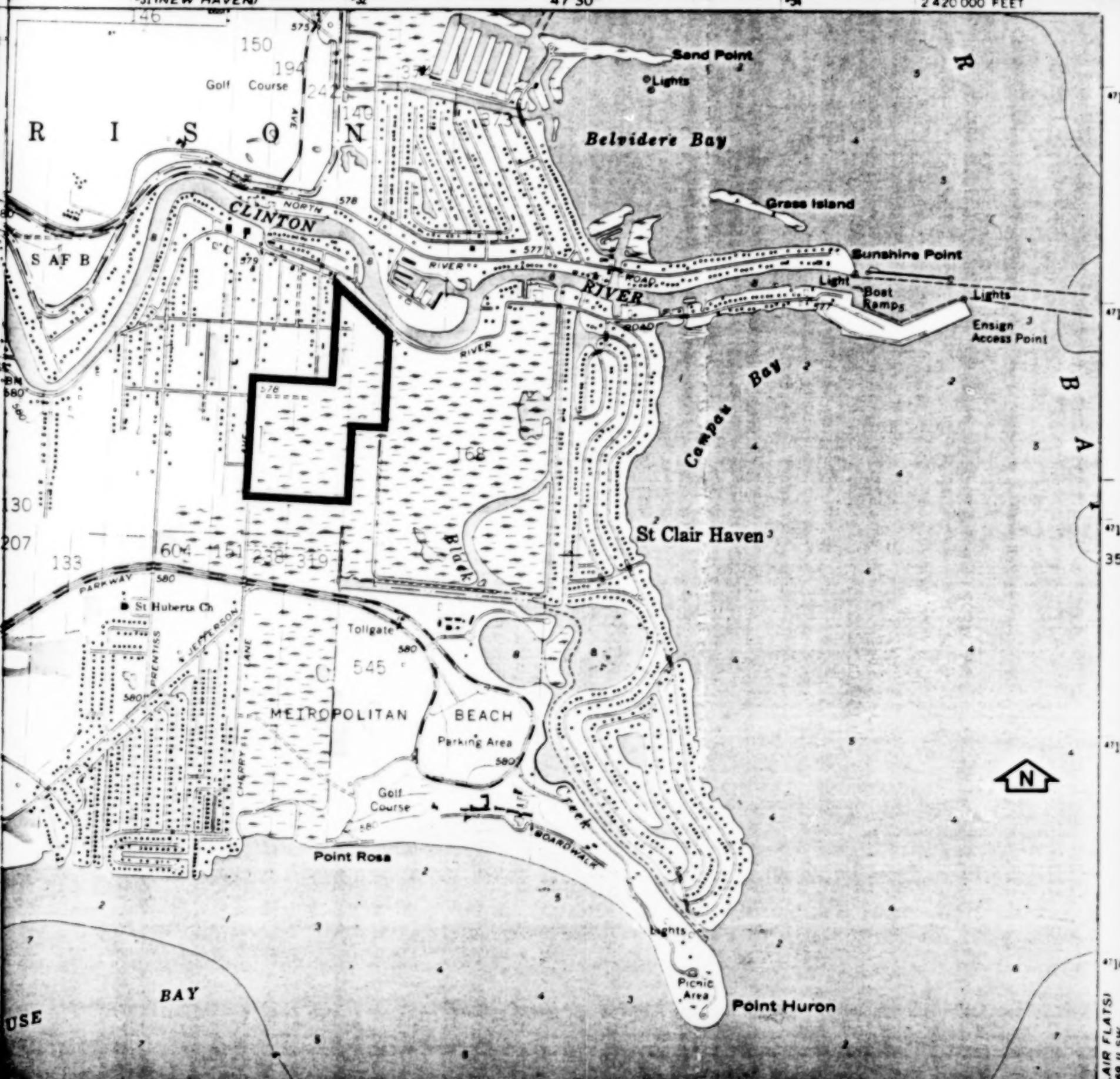
EDWARD J. KELLY, CHIEF, TOPOGRAPHIC SECTION, DIVISION OF SURVEY  
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SCALE 1:24,000

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CONTOUR INTERVAL 5 FEET  
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**Property Boundary**



FILED

IN THE

**Supreme Court of the United States**ALEXANDER L. STEVENS,  
CLERK

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

*Petitioner*

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**BRIEF OF AMICI CURIAE**

**NATIONAL WILDLIFE FEDERATION, STATE OF ALASKA,  
AMERICAN FISHERIES SOCIETY, BASS ANGLERS  
SPORTSMAN SOCIETY, CHESAPEAKE BAY FOUNDATION,  
INC., ENVIRONMENT COUNCIL OF RHODE ISLAND, INC.,  
ENVIRONMENTAL DEFENSE FUND, INC., ENVIRONMENTAL  
POLICY INSTITUTE, STATE OF FLORIDA, FLORIDA  
AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION,  
LOUISIANA WILDLIFE FEDERATION, STATE OF MICHIGAN,  
MICHIGAN UNITED CONSERVATION CLUBS, INC.,  
NATIONAL AUDUBON SOCIETY, NORTH CAROLINA  
WILDLIFE FEDERATION, SCENIC HUDSON, INC., SIERRA  
CLUB, SOUTH CAROLINA WILDLIFE FEDERATION,  
TENNESSEE CONSERVATION LEAGUE, TROUT UNLIMITED,  
WILDLIFE FEDERATION OF ALASKA, WILDLIFE MANAGEMENT  
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## **QUESTION PRESENTED**

**Whether the definition of wetlands for purposes of Clean Water Act regulation correctly includes wetland areas that are not frequently flooded by adjacent streams.**

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

**No. 84-701****UNITED STATES OF AMERICA,***Petitioner*

v.

**RIVERSIDE BAYVIEW HOMES, INC., et al.**

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**BRIEF OF AMICI CURIAE**

**NATIONAL WILDLIFE FEDERATION, STATE OF ALASKA,  
AMERICAN FISHERIES SOCIETY, BASS ANGLERS  
SPORTSMAN SOCIETY, CHESAPEAKE BAY FOUNDATION,  
INC., ENVIRONMENT COUNCIL OF RHODE ISLAND, INC.,  
ENVIRONMENTAL DEFENSE FUND, INC., ENVIRONMENTAL  
POLICY INSTITUTE, STATE OF FLORIDA, FLORIDA  
AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION,  
LOUISIANA WILDLIFE FEDERATION, STATE OF MICHIGAN,  
MICHIGAN UNITED CONSERVATION CLUBS, INC.,  
NATIONAL AUDUBON SOCIETY, NORTH CAROLINA  
WILDLIFE FEDERATION, SCENIC HUDSON, INC., SIERRA  
CLUB, SOUTH CAROLINA WILDLIFE FEDERATION,  
TENNESSEE CONSERVATION LEAGUE, TROUT UNLIMITED,  
WILDLIFE FEDERATION OF ALASKA, WILDLIFE MANAGEMENT  
INSTITUTE, and WISCONSIN WILDLIFE FEDERATION, INC.**

**IN SUPPORT OF PETITIONER****INTERESTS OF AMICI CURIAE**

Pursuant to Supreme Court Rule 36.2 the National Wild-  
life Federation and the above-listed states and organizations

file this brief as amici curiae in support of the petitioner United States. Letters of consent from counsel for the parties have been filed with the clerk.

Amici curiae are the states of Alaska, Florida, and Michigan and non-profit membership organizations dedicated to the conservation and wise use of natural resources including wetlands. Members and citizens of amici curiae regularly use and enjoy the wetlands of the United States for outdoor recreation, including fishing, hunting, hiking, camping, nature observation, photography, scientific study, and aesthetic enjoyment. Members and citizens of amici curiae also have a substantial interest in the protection and preservation of wetlands because these resources contribute to the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Members and citizens of amici curiae will be adversely affected by a judicial decision that removes important wetlands from the regulatory scope of Section 404 of the Clean Water Act, 33 U.S.C. 1344.

Amici curiae have participated extensively in all facets of public decisionmaking on the use of wetlands. Amici curiae support Section 404 of the Clean Water Act including its application in a broad geographical sense to wetlands. Amici curiae have also brought, entered, and filed amicus curiae briefs in numerous lawsuits involving Section 404 and wetlands. A more detailed statement of the interests of amici curiae is set out as Appendix A to this brief.

#### SUMMARY OF ARGUMENT

The district court properly enjoined respondent from conducting unpermitted filling in an area that clearly meets the definition of "wetlands" implemented by the Army Corps of Engineers and the Environmental Protection Agency. The court of appeals incorrectly reversed by relying on a reading of that definition that is totally at odds with its plain meaning.

The regulatory definition of wetlands is consistent with congressional intent that Section 404 of the Clean Water Act extend to wetlands of the type at issue here, regardless of

traditional standards of navigability. In 1977 Congress specifically reconsidered the jurisdictional limits of Section 404 and consciously refrained from narrowing those limits, thus reaffirming the statute's purpose of protecting wetlands because of the important functions they serve. The regulatory definition is also scientifically valid and encompasses areas most likely to perform the congressionally desired functions.

The court of appeals' reliance on the Just Compensation Clause to narrow the jurisdictional scope of Section 404 is completely misplaced. That some takings may occur under Section 404 does not render the statute or its implementing regulations invalid. Instead, the Commerce Clause provides the proper test of Congress' constitutional authority to regulate the filling of wetlands. The significant contribution to interstate commerce made by wetlands is lost upon their destruction. A regulatory effort to control this destruction is well within Congress' plenary power to regulate interstate commerce.

#### ARGUMENT

##### I. THE DISTRICT COURT PROPERLY ENJOINED FILLING ACTIVITY WITHIN AREAS OF RIVERSIDE'S TRACT THAT MEET THE REGULATORY DEFINITION OF WETLANDS.

Section 301(a) of the Clean Water Act prohibits "the discharge of any pollutant" except in compliance with specified sections of the Act. 33 U.S.C. 1311(a). One of the specified sections is Section 404 which authorizes the Secretary of the Army to issue permits "for the discharge of dredged or fill material into the navigable waters . . ." 33 U.S.C. 1344(a). The term "pollutant" is defined by the Act to include materials such as "dredged spoil, solid waste, . . . rock, sand, [and] cellar dirt . . ." 33 U.S.C. 1362(6). The Act defines "navigable waters" to mean "waters of the United States . . ." 33 U.S.C. 1362(7).

The Secretary of the Army has designated the Army Corps of Engineers (Corps) as the agency responsible for issuing

permits under Section 404. The United States Environmental Protection Agency (EPA) also has certain Section 404 responsibilities, including the "ultimate administrative authority to determine" the meaning of "waters of the United States" under that Section. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). Both the Corps and EPA interpret "waters of the United States" to include wetlands. 33 C.F.R. 323.2(a) and (c) (1984) (Corps); 40 C.F.R. 230.3(s) and (t) (1984) (EPA).

This case arose from the failure of the respondent Riverside Bayview Homes, Inc. (Riverside) to obtain a Section 404 permit before discharging fill material into wetlands located in Michigan near Lake St. Clair. The United States brought this action to enjoin those unpermitted activities.

The district court held seven days of hearings and visited the site primarily to determine whether the Riverside tract contained a wetland. The court relied upon Section 404 regulations promulgated by the Corps that defined "freshwater wetlands" to include areas "periodically inundated" and "characterized by . . . vegetation" requiring saturated soil conditions. 40 Fed. Reg. 31324-31325 (July 25, 1975), formerly codified at 33 C.F.R. 209.120(d)(2)(i)(h), quoted at Pet. App. 23a. The district court found that the Riverside tract meets the terms of this definition and enjoined further unpermitted filling (Pet. App. 22a-31a).

By the time of Riverside's initial appeal, the Corps had revised its definition of wetlands through regulations promulgated in 1977. The court of appeals remanded the appeal for reconsideration in light of the new definition. On remand the district court reaffirmed its earlier decision (Pet. App. 42a-44a).

The Corps' 1977 definition remains in effect today and has been adopted in identical form by EPA. It reads:

The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. 323.2(c) (Corps) and 40 C.F.R. 230.3(t) (EPA). The Record compiled in the district court demonstrates that Riverside's tract contains a wetland within the meaning of the Corps' and EPA's present definitions.

The wetland on Riverside's site is characterized by plants such as cattails, sedge, duckweed, and common reed (J.A. 28,33,55,59, and 75; Tr. Jan. 15, 1977 at 14 and 21). These species are recognized as "typically adapted for life in saturated soil conditions," 33 C.F.R. 323.2(c), in that they require or are tolerant of water-logged or highly saturated soils. U.S. Army Engineer Waterways Experiment Station, Preliminary Guide to the Onsite Identification and Delineation of the Wetlands of the Interior United States 9-12 and A1-A10 (1982) (hereafter "Preliminary Guide to Wetlands"); U.S. Fish & Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979) (hereafter "Classification of Wetlands").

Moreover, these plants on the Riverside tract live in an area that is "inundated or saturated by surface or ground water." The tract is occasionally flooded (Pet. App. 28a-29a; J.A. 118) and was covered by ice at the time of the January 1977 hearing (J.A. 47-48). More importantly the tract is saturated by ground water as demonstrated by a water table within inches of the surface and a soil type (called Lamson) which is highly retentive of water (J.A. 21 and 112; Tr. Jan. 21, 1977 at 163).

The ground water saturation is of a "frequency and duration sufficient to support" species adapted to "saturated soil conditions," namely, cattails, reeds, sedges, and similar species found on the site. The area has been a wetland for decades and is a part of a larger wetland area found on the western shore of Lake St. Clair (located less than a mile from the site) (J.A. 48 and 56; Tr. Jan. 15, 1977 at 155 and 158). The tract is also inhabited by wildlife species such as muskrat and long-billed marsh wrens (J.A. 41-42 and 55) which are

found almost exclusively in wetlands habitat. Harper & Row's Complete Field Guide to North American Wildlife 150 and 265 (Eastern ed. 1981).

Notwithstanding the wealth of evidence showing that the tract is a wetland within the Corps' present definition, the court of appeals reversed, ruling that the site is not a wetland for Section 404 purposes. The court of appeals' analysis is not entirely clear but the decision seems to rest on three grounds: (1) the site does not meet the present regulatory definition of a wetland (Pet. App. 8a-12a), (2) Congress probably did not intend to include such an area within the geographic reach of Section 404 (Pet. App. 13a-16a and 20a-21a), and (3) inclusion of such an area within Section 404 would result in a taking under the Fifth Amendment (Pet. App. 13a-16a).

The first ground for the decision of the court below is plainly wrong. The court of appeals focused its attention solely on the portions of the 1977 definition referring to *inundation* "at a frequency and duration sufficient to support, and that under normal circumstances [does] support wetlands vegetation" (Pet. App. 10a quoting 33 C.F.R. 323.2(c) [brackets in original]). In fact, the court fashioned its own test for geographic jurisdiction, ruling that Section 404 applies only to areas "frequently flooded by waters from adjacent streams...." (Pet. App. 15a). Since, in the court's view, the wetland vegetation found on the site was not caused by "frequent" inundation (see *id.* at 10a-12a & n.3), the court ruled that the area is not subject to regulation under Section 404 (*id.* at 12a and 15a-16a).

However, the court of appeals' conclusion is completely at odds with the plain meaning of the Corps' definition. By its express terms, the regulation encompasses wetland areas "inundated or saturated by surface or ground water" sufficient to support vegetation capable of surviving "in saturated soil conditions." 33 C.F.R. 323.2(c) [emphasis added]. The court's requirement that wetlands must be "frequently flooded by... adjacent streams" (Pet. App. 15a), regardless of the contribution made to wetlands vegetation by saturation from ground water and by saturated soil conditions, is contrary to the

language of the Corps' definition. Nonetheless, the court of appeals never explained or even acknowledged the regulatory language that is inconsistent with the result it reached.<sup>1</sup>

When read as a whole, the regulation plainly includes the Riverside tract as a wetland. Because Riverside failed to obtain a Section 404 permit, the district court's judgment for the United States and injunction against further filling should have been affirmed. However, to the extent the court of appeals' decision may be read to implicitly cast doubt on the statutory or constitutional validity of the regulatory definition of wetlands, such issues are addressed in the following discussion.

## II. CONGRESS INTENDED THE GEOGRAPHIC REACH OF SECTION 404 TO BE FREE OF TRADITIONAL JURISDICTION LIMITS.

Section 404 was enacted into law as part of the Federal Water Pollution Control Act Amendments of 1972 (1972 Act), 33 U.S.C. 1251 *et seq.*, renamed the Clean Water Act in 1977. The 1972 Act was born of the congressional perception that six federal statutes passed in the previous 24 years<sup>2</sup> to protect the aquatic environment "ha[d] been inadequate in every vital aspect." Congressional Research Service, 95th Cong., 1st Sess., Legislative History of the Federal Water Pollution Control Act Amendments (hereafter "Leg. Hist.") Vol. 2 at 1425 (1973) (Senate Committee Report).

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<sup>1</sup> The court of appeals decision is also flatly contradicted by the Corps' regulatory definition of "waters of the United States." 42 Fed. Reg. 37144 (July 19, 1977) and 47 Fed. Reg. 31810-31811 (July 22, 1982), codified at 33 C.F.R. 323.2(a). Since 1977 the Corps' definition of "waters of the United States" has referred to types of wetlands such as "isolated" wetlands and prairie potholes that have no clear surface water hydrologic connection to traditional navigable waters. *Id.*, see also 49 Fed. Reg. 39484 (Oct. 5, 1984), to be codified at 33 C.F.R. 330.5(a)(26)(ii) (defining "isolated" wetlands). EPA's definition of "waters of the United States" also includes such wetlands. 40 C.F.R. 230.3(s).

<sup>2</sup> Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155; Federal Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91.

One "vital aspect" was the lack of adequate enforcement. *Id.* at 1423. All of the preceding legislation provided for some form of federal enforcement authority but only one enforcement action was brought between 1948 and 1972 and it was largely a failure.<sup>3</sup> *Id.* This abysmal record resulted in part from restrictions imposed by these statutes on the geographic jurisdiction of federal enforcement agencies. Under the pre-1972 legislation, federal abatement suits were limited to cases where it could be proved that discharges in one state endangered health or welfare in another state. Abatement suits were also limited to pollution of interstate, navigable-in-fact, or coastal waters.<sup>4</sup>

Congressional awareness of the jurisdictional limitation and similar problems led to the creation of a completely new Act in 1972 intended to provide a clean break with past outmoded and ineffective legislative approaches.<sup>5</sup> The very first sentence of the new Act announced Congress' ambitious aim to provide effective federal protection of America's aquatic environment:

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

33 U.S.C. 1251(a). The House Committee further amplified this goal by explaining that the word "integrity" was intended

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<sup>3</sup> The case concerned sewage disposal by a midwestern city. After six years of enforcement effort the city was still treating only half of its sewage and dumping more than five million tons of raw sewage per day. 2 Leg. Hist. 1423.

<sup>4</sup> See note 2 *supra*. 1948 Act, §§ 2(d) and 3(e); 1956 Act §§ 8 and 11(e); 1961 Act §§ 8 and 8(f)(2), see 2 [1961] U.S. Code Cong. & Ad. News 2082-2084 (House Committee Report) (definition of "navigable waters"). For more detailed discussion of the inadequacies of pre-1972 legislation see D. Zwick & M. Benstock, Water Wasteland (1971); Wenner, Federal Water Pollution Control Statutes in Theory and Practice, 4 Envt'l Law 251 (1974).

<sup>5</sup> Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407, were also in force in 1972. The geographic jurisdiction of both is limited to waters navigable-in-fact. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); see also Want, Federal Wetlands Law: The Cases and the Problems, 8 Harv. Envt'l L. Rev. 1, 5-8 (1984).

to refer to "a condition in which the *natural* structure and function of *ecosystems* is maintained." 1 Leg. Hist. 763 [emphasis added]. An additional goal states that the Act is intended to provide "for the protection and propagation of fish, shellfish, and wildlife. . ." 33 U.S.C. 1251(a)(2).

Congress' use of these terms to describe the purposes of the 1972 Act suggests legislative awareness that a scientific approach would be necessary to solve a scientific problem. Such a view is consistent with Congress' approach to geographic jurisdiction in the 1972 Act which thoroughly demolished the traditional notion that federal regulatory authority should be limited to interstate or navigable-in-fact waters. The term "navigable waters," which states the geographic reach of the 1972 Act, including Section 404, is expressly defined in the statute to mean "waters of the United States," without qualification. 33 U.S.C. 1362(7). By this latter phrase Congress meant to include "all 'the waters of the United States' in a geographical sense." 1 Leg. Hist. 250 (Remarks of Rep. Dingell) [emphasis added]. The geographic jurisdiction of the 1972 Act is to be bounded only by the limits of Congress' constitutional power:

The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation. . . .

1 Leg. Hist. 327 (Conference Report).

The lesson of the previous 24 years of federal legislation was not lost on Congress. Natural aquatic systems pay no attention to state lines or the ability of a water body to float goods in commerce. Instead, as noted by the Senate Public Works Committee: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." 2 Leg. Hist. 1495. Thus the geographic reach of the 1972 Act must be viewed in terms of the natural functions of aquatic ecosystems subject only to the limits of Congress' power to regulate interstate commerce.

Section 404's regulation of discharges of dredged or fill material into "navigable waters" also reflects this congressional intent. Congress is presumed to have intended that the term "navigable waters" have the same broad meaning throughout the Act. See *Colautti v. Franklin*, 439 U.S. 379, 392-393 & n.10 (1979); 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. 1984 rev.). Thus, the express definition of "navigable waters" to mean "waters of the United States," 33 U.S.C. 1362(7), applies with equal force to Section 404.

Indeed, Section 404 is woven into the fabric of the 1972 Act and its goals. As stated in Section 301(a), the heart of the Act's regulatory mechanism,

[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, *and 404*..., the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1311(a) [emphasis added]. Violations of Section 301, and hence of Section 404, are punishable by civil and criminal penalties under Section 309, 33 U.S.C. 1319, the general enforcement provision for the Act. Therefore Congress' articulated effort to create broad geographic jurisdiction, coextensive with the Commerce Clause and consistent with scientific knowledge of ecosystem functions, applies to Section 404 as well as the rest of the 1972 Act.

Although the Corps of Engineers originally limited the Section 404 permit program to traditionally navigable waters, both the EPA and the Department of Justice read the 1972 Act and Section 404 to eliminate such historic limitations. See Want, *Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Envt'l L. Rev. 1, 10-11 & n. 90 (1984). The courts agreed with EPA and the Justice Department and in 1975 the Corps was ordered to discard the traditional tests of navigability for geographic jurisdiction under Section 404. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Later that year the Corps complied, promulgating the regulatory definition of "freshwater wetlands" initially involved in the present suit. 40 Fed. Reg. 31324-31325.

### **III. THE 1977 LEGISLATIVE HISTORY DEMONSTRATES A CONTINUED LEGISLATIVE COMMITMENT TO SECTION 404's GEOGRAPHIC JURISDICTION ESPECIALLY WITH REGARD TO WETLANDS.**

In 1977 Congress revisited the 1972 Act. At that time efforts were made to amend Section 404 so that its geographic jurisdiction would be limited to waters navigable-in-fact, tidal waters, and wetlands adjacent thereto. Congress' rejection of those efforts underscores the legislative commitment to broad jurisdiction for Section 404, recognizing the natural functions of aquatic ecosystems, especially wetlands.

During the course of these legislative proceedings, opponents of amendments to reduce Section 404's geographic jurisdiction sought to persuade their colleagues by extolling the many valuable environmental functions performed by wetlands. The Senate Public Works Committee reported a bill to amend the 1972 Act in several respects but retaining intact Section 404's geographic jurisdiction. Members of the Committee, such as Senator Baker, defended continued Section 404 jurisdiction over wetlands by describing the many values of wetlands:

As you know, wetlands are a priceless, multiuse resource. They perform the following services:

First, high yield food sources for aquatic animals;

Second, spawning and nursery areas for commercial and sports fish;

Third, natural treatment of waterborne and airborne pollutants;

Fourth, recharge of ground water for water supply;

Fifth, natural protection from floods and storms; and

Sixth, essential nesting and wintering areas for waterfowl.

We should be mindful of the fact that when these areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

4 Leg. Hist. 923. (Debate on Senate bill). Other Committee members including Senators Stafford, Chafee, and Hart echoed this argument. *Id.* at 881-882, 917, and 927 (Debate on Senate bill). Senator Muskie, a member of the Committee as well as principal sponsor of the 1972 Act and floor manager of the 1977 bill, made a similar argument, describing wetlands as some of "the Nation's most biologically active areas." *Id.* at 869-870 (Debate on Senate bill).

Although an amendment limiting Section 404's geographic scope passed the House, opponents of that effort espoused these same values. For example, Representative Lehman argued that Section 404

is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless aesthetic and recreation benefits that are enjoyed throughout the Nation. Furthermore, wetlands provide free of charge \$140 billion worth of flood protection and water purification services, according to the clean water action project. Such priceless natural resources should be given Federal protection from development and destruction.

*Id.* at 1317 (Debate on House bill). Representative Bonior, whose District includes Riverside's wetlands, invoked similar arguments in support of broad Section 404 jurisdiction. *Id.* at 1320 (Debate on House bill); see also *id.* at 1247 (House Committee Report, Additional Views of Reps. Edgar and Myers). These arguments carried the day as Congress amended Section 404 in several respects but refrained from altering the Section's geographic scope enacted in 1972.

The 1977 legislative history is of particular significance in this case because Congress was consciously responding to

judicial decisions such as *NRDC v. Callaway, supra*, that had rejected the traditional navigability standards and applied Section 404 to wetlands. The Committee Report accompanying the House bill seeking to reduce Section 404 jurisdiction referred directly to *NRDC v. Callaway*. 4 Leg. Hist. 1216. Senator Bentsen proposed a similar amendment on the Senate Floor, arguing that the "scope of [Section 404] jurisdiction as defined by the courts" was inconsistent with Congress' original intent in 1972. *Id.* at 903.

In debate on the Conference Committee bill that left Section 404's jurisdiction intact, Representative Don H. Clausen reminded his colleagues that

[a] full understanding of [the 1972 Act] can only be achieved by having an understanding of the case law interpreting the public law.

3 Leg. Hist. 374. Representative Clausen also referred in these remarks to a Library of Congress publication entitled "Case Law Under the Federal Water Pollution Control Act Amendments of 1972."<sup>6</sup> This document discusses (*id.* at 84-88) *NRDC v. Callaway, supra*, and other cases reaching similar conclusions on the scope of Section 404. Representative Clausen's statement and the Library of Congress litigation summary to which he referred demonstrate congressional awareness of the 1972 Act's meaning as construed by the courts. *Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102, 1109 & n. 17 (1985). Congress was clearly conscious that it was rejecting an effort to legislatively overrule that case law. See *id.*

In this context the view of a later Congress on an earlier enactment has "persuasive value" because

"[h]ere we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean."

*Bell v. New Jersey*, 461 U.S. 773, 784-785 & n. 12 (1983), quoting *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343

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<sup>6</sup> House Public Works and Transportation Committee Print 95-35.

(5th Cir. 1975). Thus Congress clearly intended the phrase "navigable waters" in the 1972 Act to include, without regard to artificial geographic limitations, the vast multitude of wetlands so beneficial to society. See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F. 2d 617, 626 (8th Cir. 1979) (applying 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

The 1977 legislative history clearly demonstrates that Section 404 applies to wetlands. Remarks praising the valuable biological and hydrologic contributions of wetlands, particularly when made during debate over geographic jurisdiction, cannot be squared with artificial geographic limits such as the traditional navigability test.

Moreover, the 1977 legislative history's recognition of wetlands values is entirely consistent with the 1972 Act's goals of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters[,] and "the protection and propagation of fish, shellfish, and wildlife...." 33 U.S.C. 1251(a) and (a)(2). This theme is echoed by Section 404(c) of the 1972 Act, which provides the Administrator of EPA with final authority to preclude discharge of dredged or fill material into sites where there will be "an unacceptable adverse effect on . . . shellfish beds and fishery areas (including spawning and breeding areas) . . . [and] wildlife. . ." 33 U.S.C. 1344(c). The remarks of Senator Baker, Representative Lehman, and others during the 1977 debates demonstrate that Congress was well aware of the contributions wetlands make toward these goals.

Finally, congressional support for broad geographic jurisdiction is reflected in one of the amendments to Section 404 that Congress did pass in 1977. The addition of subsection (g) to Section 404 thoroughly repudiates any limitation of the Section to waters navigable-in-fact. Section 404(g) provides for state assumption of the Section 404 program under certain conditions. However, Section 404(g)(1) expressly excludes state assumption of jurisdiction over traditionally navigable and tidal waters, "including wetlands adjacent thereto. . ." 33 U.S.C. 1344(g)(1) [emphasis added]. Thus Congress not

only used the word "wetlands" in Section 404 but also expressed its intent that the Section's geographic reach extend beyond traditional navigable waters. Had Congress intended to limit Section 404 to traditionally navigable waters in the first place, provision for state assumption of regulation over all other wetland areas would be meaningless because there would be nothing to assume. Section 404's geographic scope must be construed to avoid rendering Section 404(g) meaningless or superfluous. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979).

#### **IV. THE REGULATORY AGENCIES' DEFINITIONS OF "WETLANDS" FULFILL CONGRESSIONAL INTENT BY IDENTIFYING WETLAND AREAS LIKELY TO PERFORM FUNCTIONS CONGRESS CONSIDERED TO BE VALUABLE.**

Section 404 must be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Those purposes are reflected in the 1972 Act's removal of artificial barriers to geographic jurisdiction and the 1977 legislative history demonstrating congressional intent to protect wetlands because of the valuable functions they may perform. Significantly, Congress has never expressed any intent to limit the types of wetlands to which Section 404 should be applied. Therefore, as far as geographic jurisdiction is concerned, Section 404 should be interpreted to achieve Congress' purposes by extending to all areas that are likely to perform wetland functions.

The regulatory definition of wetlands must be scientifically valid to meet the 1972 Act's goal of maintaining and restoring the integrity of ecosystem functions. Scientific accuracy also ensures that the definition includes areas that may perform wetlands functions Congress considered to be valuable. Limitations on Section 404's geographic jurisdiction that are unrelated to the identification of wetlands areas and that ignore the way in which wetland ecosystems function must be rejected as contrary to congressional intent. Judged by these standards, the Corps' and EPA's definition of wetlands is consistent with Congressional intent while the court of appeals' requirement of "frequent flooding" (Pet. App. 15a) is not.

To a scientist, "wetlands" are essentially those areas where life can survive in a saturated environment. According to the United States Fish and Wildlife Service,

wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface. The single feature that most wetlands share is soil or substrate that is at least periodically saturated with or covered by water. The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or in saturated soil.

U.S. Fish & Wildlife Service, *Classification of Wetlands, supra*, at 3.<sup>7</sup> The primary factors influencing wetland areas are the extent and duration of water present. As a result, life existing in such areas must be tolerant of or dependent upon saturated conditions to survive. Therefore, one of the most accurate approaches to identifying wetlands is to rely upon the presence of life forms that require or are tolerant of areas covered by or saturated with water.

The identical definitions of "wetlands" adopted by the Corps and the EPA for purposes of Section 404 regulation use this approach.<sup>8</sup> These definitions appropriately focus on "areas . . . inundated or saturated by surface or ground water at

<sup>7</sup> The U.S. Fish and Wildlife Service is responsible for administering the National Wetlands Inventory, see Section 208(i)(2), 33 U.S.C. 1288(i)(2), designed to use the Service's biological expertise to provide scientific information on wetlands characteristics as well as to indicate the extent of such areas in the United States. U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends 1* (1984). The information is intended to provide technical assistance to agencies regulating activities in wetlands. *Id.*; see 33 U.S.C. 1288(i).

<sup>8</sup> EPA shares Section 404 permit responsibility with the Corps. EPA has ultimate authority in permit decisions by virtue of its power to veto permits issued by the Corps. Section 404(c), 33 U.S.C. 1344(c). In addition, EPA has authority to bring an enforcement action against any unpermitted discharge of dredged or fill material into wetlands. Sections 301(a), 309(b) and (c), 33 U.S.C. 1311(a), 1319(b) and (c).

a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c)(Corps) and 40 C.F.R. 230.3(t)(EPA). Thus, the "prevalence of vegetation" capable of surviving "in saturated soil conditions" is the focus of identifying wetlands for Section 404 regulatory purposes. These species of vegetation have been catalogued and there is widespread scientific agreement on their identity. See e.g. *Preliminary Guide to Wetlands, supra*; *Classification of Wetlands, supra*.

Wetlands may be formed by a variety of water sources including surface runoff, ground water tables, and water body overflow. M. Weller, *Freshwater Marshes: Ecology and Wildlife Management 11-13* (1981) (hereafter "Weller"). The presence of enough water to create physiological stress for nonadaptive life forms is important. The source of the water is not. See *Classification of Wetlands, supra*, at 3. As a result there is no scientific basis for requiring a "hydrologic connection" between a wetland and nearby water bodies to create Section 404 jurisdiction. The regulatory definitions correctly avoid such a purely artificial limitation, stating that the "inundat[ion] or saturat[ion]" that supports wetland vegetation may be caused "by surface or ground water[,] regardless of the source of that water. 33 C.F.R. 323.2(c) and 40 C.F.R. 230.3(t).

Finally, wetlands are dynamic areas that result from the interaction of climatic, geologic, hydrologic, and biologic processes. Gosselink & Turner, *The Role of Hydrology in Freshwater Wetland Ecosystems*, in Good, et al. (eds.), *Freshwater Wetlands: Ecological Processes and Management Potential 64* (1978). A wetland area may fluctuate in size over time depending upon factors such as the amount of water available. McCormick, *Ecology and the Regulation of Freshwater Wetlands*, in *id.* at 353-354; Weller, *supra*, at 55. Any scientifically valid demarcation of wetlands must acknowledge the dynamic nature of wetlands because an area may presently provide wetland values even if it did not in the past. The Corps' preamble to the present regulatory definition of wetlands properly takes this fact into account: "Our intent under Section

404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (July 19, 1977). This conforms to Congress' recognition that "[e]cosystems themselves are dynamic, changing things." 1 Leg. Hist. 764 (House Committee Report on 1972 Act).

Therefore the regulatory definitions of wetlands for Section 404 purposes are consistent with congressional intent because they draw jurisdictional lines on the basis of ecosystem functions and apply Section 404 to areas likely to provide the kind of values identified by Congress in the 1977 legislative history. In fact, the agencies' approach to defining wetlands was noted with approval during the 1977 debates: "The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas." 4 Leg. Hist. 922 (Remarks of Sen. Baker).

#### **V. THE DECISION OF THE COURT BELOW IMPOSES AN ARTIFICIAL JURISDICTIONAL LIMITATION ON SECTION 404 THAT EXCLUDES WETLANDS THAT CONGRESS INTENDED TO REGULATE.**

Measured by the standards of congressional intent and scientific validity, the decision of the court below is incorrect. The Riverside tract clearly contains a wetland as demonstrated by the prevalence of plant species that require or are tolerant of saturated conditions and the abundant presence of wetland animal species such as the muskrat and long-billed marsh wren. Nonetheless the court of appeals excluded the site from the coverage of Section 404 because it is not "frequently flooded by waters from adjacent streams" (Pet. App. 15a).

This newly-invented standard imposes a completely artificial, nonscientific limitation on the geographic reach of Section 404. Such a result flatly contradicts Congress' well expressed intent that the 1972 Act's jurisdiction should recognize the existence of natural ecosystems and that Section 404 should apply to wetlands because those areas perform valuable functions.

Many types of wetlands that would not meet the court of appeals' standard nonetheless perform functions discussed in

the 1977 legislative history. For example, the Northern Great Plains contain approximately three million acres of "prairie pothole" wetlands formed by glacial depressions in a relatively flat landscape. U.S. Fish & Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 42 (1984) (hereafter "Wetlands of the United States"). Although few of these wetlands are frequently flooded by adjacent streams they provide significant wetland functions. *Id.*; Weller, *supra*, at 7-9 and 12. Prairie potholes constitute only one-tenth of North America's waterfowl breeding area but produce half of the annual duck crop and provide substantial flood control functions, retaining up to 75% of surface runoff. Wetlands of the United States, *supra*, at 22 and 42-43. Many prairie potholes also contribute to groundwater recharge. *Id.* at 23.

Alaska's 100 million acres of tundra wetlands are the result of snowmelt and the thawing of permafrost substrate. Weller, *supra*, at 10; Office of Technology Assessment, Wetland Use and Regulation: Alaska Case Study 2-2 and 2-3 (1983). Frequent flooding by adjacent streams plays little or no part in the hydrology of these wetlands. Yet tundra wetlands provide nesting and breeding habitat for millions of ducks, geese, other waterfowl, and shorebirds which migrate to Alaska each year. *Id.* at iii, 2-6 and 2-7. Caribou herds depend on vast areas of wet tundra not only for calving grounds but also for migratory range which prevents depletion of their lichen food supply. *Id.* at iii and 2-6 through 2-8.

Similarly the 2.2 million acres of pocosin wetlands in North Carolina are formed by ground water and rainfall, not flooding by adjacent streams. C. Richardson, Pocosin Wetlands 5 (1981) (hereafter "Richardson"). These forested wetlands provide habitat for many animal species, including coastal black bears, and contribute to the well-being of shellfish and finfish nurseries. Wetlands of the United States, *supra*, at 49; Richardson, *supra*, 243-249.

Few if any of these wetlands fall within the court of appeals' narrow restriction on the geographic reach of Section 404. Nonetheless they are undoubtedly wetlands from a scientific point of view and perform valuable wetlands functions. These same functions stimulated Congress to include

wetlands within the scope of Section 404 as demonstrated by the statements made in the 1977 legislative history.

The decision of the court below is also contrary to congressional intent because it places scientifically unsound limits on the jurisdictional reach of the 1972 Act. Even though the vegetation on Riverside's tract is characterized by species adapted to waterlogged or highly saturated soils (such as cattails, sedge, and common reed), the court of appeals rejected these indicators because their presence was not necessarily caused by inundation from a nearby waterway (Pet. App. 11a-12a and n. 3). The court of appeals never explained why this hydrologic connection is required for an area to be a wetland subject to Section 404. From a scientific point of view the source of the water is irrelevant to the identification of a wetland. Accordingly, the court of appeals' implicit rejection of ground water as a source of saturation is exactly the kind of artificial distinction repudiated by Congress in the 1972 Act, as expressed by the Senate Committee Report:

The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction.

2 Leg. Hist. 1491.

The court of appeals was also incorrectly concerned with possible previous uses of the tract, as if those somehow bear relation to the existence of a wetland (Pet. App. 3a, 13a-14a, and 21a). However, the fact that fire hydrants and storm sewers may have been placed on the tract 70 years ago (and never used) does not prevent an area from being a wetland or performing wetland functions, as demonstrated by the Record in this case.<sup>9</sup> Also irrelevant is the remote possibility that the area's wetland characteristics stem from manmade flood control

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<sup>9</sup> In fact Riverside's proposed fill will render the storm sewers useless as their openings will be several feet underground (Tr. Jan. 17, 1977 at 64). Therefore the existence of these obsolete "improvements" should not logically form a basis for denying federal jurisdiction over the filling activity.

structures.<sup>10</sup> As noted above, wetlands are dynamic ecosystems subject to fluctuation. Notwithstanding this trait, wetlands may still be valuable. For example, some prairie potholes may dry up entirely during some seasons and years. Weller, *supra*, at 55; Wetlands of the United States, *supra*, at 42-43. They are nonetheless valuable habitat for waterfowl during wet years and seasons. Therefore failure to include a wetland within Section 404 "as it exists," 42 Fed. Reg. 37128, at the time of regulation constitutes still another artificial, nonscientific limitation on jurisdiction. As such it is invalid.<sup>11</sup> See *United States v. Ciampitti*, 583 F. Supp. 483, 492-495 (D.N.J. 1984), appeal pending, No. 85-5004 (3rd Cir.) (rejecting prior uses of site as bar to Section 404 jurisdiction); *Swanson v. United States*, 600 F. Supp. 802, 807-809 (D. Idaho 1985), appeal pending, No. 85-3718 (9th Cir.) (manmade expansion of "navigable water" subject to Section 404 jurisdiction); cf. *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984).

## **VI. SECTION 404 REGULATION OF RIVERSIDE'S WETLAND IS WELL WITHIN CONGRESS' CONSTITUTIONAL AUTHORITY.**

The court of appeals' constitutional analysis (Pet. App. 13a-16a) completely ignores the fact that Congress intended the Commerce Clause to provide the only limits on the geographic reach of Section 404 over wetlands. See 1 Leg. Hist. 327. Instead the court of appeals asserted that the Just Compensation Clause dictates the narrow jurisdictional limitations fashioned by the court.

### **A. The Just Compensation Clause Does Not Preclude Congress' Authority to Regulate Discharges Into Wetlands.**

The court's only authority for its "taking" holding, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), clearly upheld the federal government's Commerce Clause authority to assert

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<sup>10</sup> It is possible that the tract would be *more* frequently inundated but for the system of dikes and drains in the vicinity (Tr. Jan. 15, 1977 at 156).

<sup>11</sup> In any event Riverside's tract has probably been a wetland for decades (J.A. 56).

regulatory jurisdiction over the fish pond in question. It is true this Court ruled that the United States' efforts to require public access to the fish pond would result in a taking under the peculiar circumstances of that case. *Id.* at 179-180. However, before reaching that conclusion the Court expressly held that the fish pond falls within "the boundaries of Congress' *regulatory authority* under the Commerce Clause...." *Id.* at 172 [emphasis added]. Therefore *Kaiser Aetna's* taking holding applies only to the issue of requiring public access to private property, a point not raised by the present litigation. On the issue that is raised here, the extent of Congress' regulatory authority under the Commerce Clause, the Court found no taking and affirmed federal regulatory jurisdiction over the pond. *Id.* at 172 and 174. The court of appeals' reliance on *Kaiser Aetna* to limit Congress' Commerce Clause regulatory authority is completely misplaced.

Indeed, by relying on the Just Compensation Clause to limit Section 404's geographic reach, the court of appeals ruled in effect that Section 404 on its face constitutes a taking when applied to wetlands not "frequently flooded by... adjacent streams." However, Congress' power to regulate interstate commerce is not limited by the Just Compensation Clause even though the exercise of that power may occasionally result in a taking, so long as the statute in question leaves available an inverse condemnation action under the Tucker Act, 28 U.S.C. 1491. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880-2883 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n. 40(1981). The assertion of Section 404 jurisdiction does not preclude Riverside from availing itself of the Tucker Act.<sup>12</sup>

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<sup>12</sup> This case is an enforcement action against an unpermitted discharge. Accordingly, the only jurisdictional issue should be the statutory and constitutional authority of the United States to require such a permit. Whether the subsequent denial of Riverside's application for a Section 404 permit was lawful and constituted a taking requiring just compensation are issues appropriately raised in separate litigation initiated by Riverside. Riverside has apparently never contested the denial of the permit or pursued a Tucker Act claim for compensation.

#### B. Congress' Determination That Destruction of Wetlands Substantially Affects Interstate Commerce Has a Rational Basis.

In view of Congress' express intent that the term "navigable waters" in the 1972 Act should "be given the broadest possible constitutional interpretation," 1 Leg. Hist. 327, the geographic reach of Section 404 is coextensive with Congress' authority to regulate interstate commerce.<sup>13</sup> Therefore, the appropriate constitutional analysis in this case is to determine what limit, if any, the Commerce Clause places on Congress' assertion of geographic jurisdiction over wetlands, an issue completely ignored by the court below.

Clearly all wetland areas falling within the Corps' and the EPA's regulatory definitions of "wetlands" are well within the Commerce Clause. Congress' "plenary authority" to regulate interstate commerce, *United States v. Darby*, 312 U.S. 100, 115 (1941), is "as broad as the needs of commerce." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). The Commerce Clause authority

extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce... or persons or things in commerce," but also to "activities affecting commerce."

*Hodel v. Virginia Surface Mining*, *supra*, 452 U.S. at 276-277, quoting *Perez v. United States*, 402 U.S. 146, 150 (1971). When Congress elects to regulate an entire class of activities that substantially affect interstate commerce, even purely intrastate activities fall within the federal power. *Perez v. United States*, *supra*, 402 U.S. at 154. In such a case, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968).

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<sup>13</sup> It is clear from Rep. Dingell's remarks that Congress intended to invoke its Commerce Clause authority in enacting the 1972 Act. 1 Leg. Hist. 250-251 (Debate on Conference bill).

"The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining*, *supra*, 452 U.S. at 276. Congress' determination that discharge of dredged or fill material into the Nation's wetlands substantially affects interstate commerce must be upheld if there is "any rational basis for such a finding." *Id.*; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). Section 404's embrace of areas likely to perform the valuable functions identified in the 1977 legislative history clearly meets this test.<sup>14</sup>

During the 1977 debates, Senator Stafford defended his Committee's retention of Section 404's original geographic reach by estimating that at least 300,000 acres of wetlands are destroyed in the United States each year. 4 Leg. Hist. 882. A more recent estimate put the figure at 450,000 acres. *Wetlands of the United States*, *supra*, at 31. The 1977 legislative history is replete with detailed references to the effects of this destruction on interstate commerce.

For example, Representative Lehman noted that wetlands provide "\$140 billion worth of flood protection and water purification services. . ." 4 Leg. Hist. 1317. Senator Chafee observed that 98 percent of Maine's \$50 million-per-year fish harvest "was made up of species that depended upon the wetlands for some part of their life cycle." *Id.* at 917. Congress was also aware that wetlands make an enormous contribution to wildlife and fisheries habitat. See *id.* at 881-882 (Remarks of Sen. Stafford), 923 (Remarks of Sen. Baker), 927 (Remarks of Sen. Hart), and 1320 (Remarks of Rep. Bonior).

There is clearly a rational basis for the conclusion that wetlands filling has a substantial effect on interstate commerce. To take one example, the prairie potholes of the Northern Great Plains make up "[t]he principal waterfowl breeding grounds in the continental United States," *North Dakota v.*

<sup>14</sup> As demonstrated below, the filling of wetlands not only "affects" interstate commerce, it does so substantially, fully as much as surface mining of coal. See *Hodel v. Virginia Surface Mining*, *supra*, 452 U.S. at 307-313 (Rehnquist, J., concurring in judgment).

*United States*, 460 U.S. 300, 304 (1983), and produce over one-half of the newborn wild duck population every year. *Wetlands of the United States*, *supra*, at 42. Waterfowl travel annually along migratory corridors that encompass all or parts of 49 states. F. Bellrose, *Ducks, Geese & Swans of North America* 20-24 (1976). "The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'" *North Dakota v. United States*, *supra*, 460 U.S. at 309, quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

The hunting of migratory birds, including waterfowl, is a \$638 million per year industry. U.S. Fish & Wildlife Service, 1980 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 70 (hereafter "Wildlife Survey"). Approximately 421,000 hunters annually cross state lines to hunt migratory birds. *Id.* at 88. Millions of dollars are spent each year to purchase equipment such as field guides and binoculars for use in observing and photographing waterfowl in the United States.<sup>15</sup> *Id.* at 108 and 114. Obviously the destruction of "essential nesting and wintering areas for waterfowl," 4 Leg. Hist. 923 (Remarks of Sen. Baker), could substantially burden interstate commerce by affecting these expenditures. See *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (intrastate lake subject to Section 404 regulation because it provides habitat for migratory waterfowl).

As another example, the destruction of portions of the remaining 2.2 million acres of North Carolina's pocosin wetlands increases freshwater runoff into saltwater and brackish estuarine systems. Richardson, *supra*, at 243-249. This destruction upsets the salinity balance in these systems which destroys their usefulness as shellfish and finfish nurseries. *Id.* North Carolina's coastal fishing industry generates an estimated \$300 million in revenues per year and is dependent upon these estuarine nurseries. *Id.* at 238-239.

<sup>15</sup> Nineteen million people observed, photographed, or fed wild waterfowl in 1980. *Wildlife Survey*, *supra*, at 108. That same year approximately \$97 million was spent on field guides and binoculars primarily for the observation of wildlife. *Id.* at 114.

These examples cover only a narrow portion of the impacts on interstate commerce resulting from the destruction of wetlands "essential to the preservation of migratory and resident fish, bird and other animal populations...." 4 Leg. Hist. 881-882 (Remarks of Sen. Stafford). The wildlife habitat impacts alone demonstrate the rational basis for Congress' determination that interstate commerce is adversely affected by the destruction of wetlands. The impacts on air and water quality and flood control, in combination with habitat destruction, clearly show that elimination of wetlands substantially affects interstate commerce. See *Hodel v. Virginia Surface Mining*, *supra*, at 277-280. As this Court ruled in *Hodel*, "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282 (footnote omitted).

In addition it is a classic exercise of Commerce Clause power to enact federal legislation imposing minimum standards on commercial activity to protect states that regulate the activity from competition with those states that do not. *United States v. Darby*, *supra*, 312 U.S. at 115. Prevention of industrial "forum shopping" is appropriate in the context of environmental regulation. *Hodel v. Virginia Surface Mining*, *supra*, 453 U.S. at 281-282.

Concern with this sort of "ecological blackmail," 1 Leg. Hist. 869 (House Committee Report, Additional Views of Reps. Abzug and Rangel), clearly influenced enactment of the 1972 Act:

When states are confronted by competition for industrial locations, water quality so often is the real loser.

1 Leg. Hist. 433 (Testimony of League of Women Voters inserted in the Record by Rep. Gude). The Governor of Minnesota complained in House Committee testimony of "the practice of playing off one state against the other." *Id.* at 452

(Testimony quoted in Remarks of Rep. Reuss); see D. Zwick and M. Benstock, *Water Wasteland* 231 (1971).<sup>16</sup>

The forum shopping problem is an obvious concern in the context of Section 404, particularly because 95 percent of the Nation's wetlands are inland wetlands which are not protected by law in most states. Office of Technology Assessment, *Wetlands: Their Use and Regulation* 187-188 (1984). Assertion of federal jurisdiction over wetlands is well within Congress' power to regulate interstate commerce. See *Hodel v. Virginia Surface Mining*, *supra*, 452 U.S. at 281-282.

It is also clear that the Commerce Clause authority extends even to wetlands that might be "intrastate" in character. Wetlands that are not hydrologically connected to a traditionally navigable water and that are completely contained in one state may still exert a substantial effect on interstate commerce as in the case of prairie potholes. Even though the filling of one such wetland may seem local in nature, that "by itself is not enough to remove [it] from the scope of federal regulation where," the impact, "taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942). The destruction of 300,000 to 450,000 acres of wetlands per year can hardly be considered trivial. Congress may properly consider all discharges of dredged or fill material into wetlands to constitute, in combination, a substantial impact on interstate commerce and hence regulate them all. See *United States v. Darby*, *supra*, 312 U.S. at 123.

Therefore, Congress' evident intent to adopt a regulatory program with comprehensive geographic jurisdiction over wetlands is entirely consistent with the Commerce Clause. Since Riverside's tract indisputably falls within the regulatory definitions, the discharge of dredged or fill material onto the site is properly governed by Section 404. The court of appeals'

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<sup>16</sup> These concerns led to the 1972 Act's creation of national effluent standards "so that industries will no longer be able to relocate to a community of less stringent pollution standards...." 1 Leg. Hist. 132 (Remarks of Sen. Williams).

exclusion of the tract from this regulatory program is incorrect as a matter of statutory interpretation and constitutional legislative authority.

### **CONCLUSION**

For these reasons and those stated in the Brief of the United States, the judgment of the court below should be reversed.

Respectfully submitted,

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## **APPENDIX A**

### **Detailed Statement of Interests**

The National Wildlife Federation is a nonprofit membership organization incorporated in 1939 under the laws of the District of Columbia. The Federation maintains its headquarters at 1412 Sixteenth Street, N.W., Washington, DC 20036 (telephone 202-797-6827). The Federation is the largest nongovernmental conservation education organization in the world, with affiliate organizations in 50 states and three territories. Its 4.1 million members and supporters are dedicated to increasing public awareness of the need for wise use, proper management, and conservation of our natural resources. The Federation undertakes a comprehensive conservation education program, distributes numerous periodicals and educational materials, lobbies for the adoption of laws to protect and improve the environment, and litigates when necessary to conserve natural resources and wildlife. The Federation has undertaken a wide range of legal, legislative, administrative, and educational initiatives aimed at improving the conservation of wetlands and other wildlife habitat.

The State of Alaska contains as many as 200 million acres of wetlands, including almost 100 million acres of tundra. Unlike most states, Alaska has retained most of its wetlands intact. The people of Alaska depend on wetlands to support wildlife habitat and fisheries. Because these valuable wetlands are subject to development pressure, the State of Alaska supports a strong federal regulatory program of wetlands protection.

The American Fisheries Society is a nonprofit professional society organized in 1870 to promote the conservation, development and wise utilization of recreational and commercial fisheries. The Society supports the conservation of wetlands because such areas play a critical role in the well-being of many fisheries. The Society has 8,300 members.

The Bass Anglers Sportsman Society (BASS) is a non-profit membership organization founded in 1968 to fight pollution and provide conservation education. BASS's member

sportsmen and 1500 affiliated local chapters are located in all 50 states. BASS's members are committed to the preservation of wetlands and water quality in order to maintain and enhance the nation's fishery resources.

The Chesapeake Bay Foundation, Inc., is a nonprofit regional membership organization founded in 1966 to promote the environmental welfare and proper management of Chesapeake Bay, including its tributaries. The Foundation accomplishes these goals through citizen representation, environmental education, and land preservation. The Foundation has 25,000 members.

The Environment Council of Rhode Island, Inc., is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Environmental Defense Fund, Inc., is a nationwide public interest organization of lawyers, scientists, and economists dedicated to protecting and improving environmental quality and public health. The Fund pursues responsible reform of public policy in a number of environmental fields including water resources, land use, wildlife, and wetlands conservation, working through research, public education, and judicial, administrative, and legislative action. The Fund has 50,000 members including residents in all 50 states.

The Environmental Policy Institute is a nonprofit organization that conducts research, education, lobbying, and litigation on key energy and environmental laws. The Institute is dedicated to organizing economically, politically, and geographically diverse citizen coalitions on environmental issues including water quality and wetlands protection. The Institute produces a periodic educational newsletter reporting on these issues to concerned citizens across the country.

The State of Florida has a vital interest in protecting the significant wetland resources found in Florida. Over 40 percent of Florida's original wetlands have been destroyed by human activity. This loss has had a devastating effect on Florida's economy, causing increased flooding of property and decreased catches in fisheries dependent upon wetlands. Although Florida

has enacted wetlands legislation, a strong federal regulatory program is necessary to enhance State wetlands protection.

The Florida Audubon Society is a statewide nonprofit organization founded in 1900 to provide an understanding of, and an interest in wildlife, and in the environment that supports it, and to further the cause of wildlife conservation.

The Florida Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Louisiana Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The State of Michigan was the first state in the Nation to assume responsibility for dredge and fill projects in waters regulated under Section 404 of the Clean Water Act, 33 U.S.C. 1344, from the United States Environmental Protection Agency. Michigan has a long history of concern for, and actions to protect, its valued wetlands. Michigan is vitally interested in the outcome because the controversy involves natural resources located within the State of Michigan.

Michigan United Conservation Clubs, Inc., is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The National Audubon Society is a nonprofit national membership organization dedicated to the conservation and wise use of wetlands and other natural resources. Since the turn of the century, National Audubon has been active in efforts to protect migratory birds and their habitat, including wetlands. National Audubon has over one-half million members in the United States and several foreign countries. These members use the nation's wetlands for birdwatching, fishing and other recreational pursuits, and for scientific research. National Audubon owns and manages a nationwide system of sanctuaries totaling over 200,000 acres, many of which contain wetland systems, which provide essential habitat for birds, other wildlife and rare plants.

The North Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Scenic Hudson, Inc. is a nonprofit, citizen's conservation group founded in 1963 to improve and preserve the natural, recreational, historic and scenic resources of the Hudson River Valley, including wetlands.

The Sierra Club is a nonprofit national membership organization founded in 1892 to promote the responsible use of the earth's ecosystems, to enjoy and protect the earth's resources, and to educate humanity in the need to protect and restore the quality of the natural and human environment. With approximately 336,000 members and 54 local chapters coast to coast, the Sierra Club works on legislation, litigation, public information, and outings to protect, understand, and enjoy the natural environment.

The South Carolina Wildlife Federation is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Tennessee Conservation League is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

Trout Unlimited is a nonprofit international conservation organization founded in 1959 and dedicated to the protection of clean water and the enhancement of trout and salmon fishery resources. Trout Unlimited has 32,000 members.

The Wildlife Federation of Alaska is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

The Wildlife Management Institute is a national nonprofit membership organization, supported by industries, groups, and individuals, promoting better use of natural resources for the welfare of the Nation. The Institute is particularly concerned with the conservation of wetlands because of the importance of this resource to wildlife habitat.

The Wisconsin Wildlife Federation, Inc. is a statewide nonprofit organization affiliated with the National Wildlife Federation whose goals and objectives it shares.

1

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,  
*Petitioner,*

v.  
RIVERSIDE BAYVIEW HOMES, INC., et al.,  
*Respondents.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit**

---

### BRIEF OF AMICI CURIAE

---

STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA, CALIFORNIA COASTAL COMMISSION, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, CALIFORNIA COASTAL CONSERVANCY, AND THE STATES OF CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, TENNESSEE, VERMONT, WEST VIRGINIA, AND WISCONSIN

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## **QUESTION PRESENTED**

**Whether the Corps of Engineers' administrative interpretation of its jurisdiction to regulate discharges into "adjacent wetlands" under the Clean Water Act of 1977 properly embraces inundated or saturated lands which support aquatic vegetation, but are not necessarily "frequently flooded" by adjacent streams, lakes, or seas.**

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BRIEF OF AMICI CURIAE

STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA, CALIFORNIA COASTAL COMMISSION, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, CALIFORNIA COASTAL CONSERVANCY, AND THE STATES OF CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, TENNESSEE, VERMONT, WEST VIRGINIA, AND WISCONSIN

Amici respectfully submit this brief, pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in support of petitioner, the United States of America.

#### INTERESTS OF AMICI

The states which have joined as amici in this brief share a deep and abiding concern for the future of wetlands within their respective jurisdictions. The historic loss of wetlands described below and the manifold threats to their existence impel amici to urge that this Court uphold the legal authority of the U.S. Army Corps of Engineers ("Corps") to effectively regulate discharge activities in wetlands.

Wetlands perform a variety of ecological functions which are of tremendous significance. They provide food and habitat for many varieties of fish, and both game and nongame animals. Office of Technology Assessment, Congress of the United States, Wetlands: Their Use and Regulation 52-60 (1984) [hereinafter "OTA, Wetlands"]. In addition to providing year-round habitat for resident bird species, wetlands are important as breeding grounds, wintering areas, and feeding sites for migratory waterfowl and other birds. Fish and Wildlife Service, U.S. Dep't of the Interior, Wetlands of the United States: Current Status and Recent Trends 14 (1984) [hereinafter "Wetlands of the U.S."]; Council on Environmental Quality, Our Nation's Wetlands 2 (1978) [hereinafter "CEQ, Our Nation's Wetlands"]. Wetlands are among the most productive ecosystems in nature, and therefore serve as an important link in the food chain. OTA, Wetlands at 57-59; CEQ, Our Nation's Wetlands at 2, 21-22; *see* J. Kusler, Our National Wetland Heritage 3 (1983).

The economic and commercial implications of these environmental values are enormous, both to the individual states which join in this brief as amici and to the nation at large. Approximately two thirds of the commercially important fish and shellfish harvested along the Atlantic coastline and in the Gulf of Mexico depend on coastal estuaries and their wetlands for food, spawning grounds, or nurseries for their young; on the Pacific coast, the figure is almost 50 percent. CEQ, Our Nation's Wetlands at 2;

Wetlands of the U.S. at 13. Sixty-three percent of total U.S. commercial landings of fish and shellfish in 1980 consisted of wetland-dependent estuarine species, representing 51.5 percent of the dollar value of the total catch (which amounts to some \$1.15 billion). OTA, *Wetlands* at 58-59.

Waterfowl shooting and other kinds of hunting are major activities in wetlands. In 1980, 5.3 million people spent \$638 million on hunting waterfowl and other migratory birds. Wetlands of the U.S. at 24. Sport fishermen spent over \$13 billion in 1975 alone pursuing wetland-dependent fishes. *Id.* The aesthetic value of wetlands defies quantification, but it is noteworthy that in 1980 alone, 28.8 million people (17 percent of the U.S. population) participated in nonconsumptive wetlands activities such as birdwatching and photographing or feeding wildlife. Wetlands of the U.S. at 24.

Wetlands perform important water purification functions by removing nutrients, processing chemical and organic wastes, and reducing sediment loads in water. CEQ, *Our Nation's Wetlands* at 22-25; Wetlands of the U.S. at 18. Certain aquatic plants are so efficient at removing pollutants from water that they are used to process domestic sewage in some parts of the country. *Id.* In their natural state, wetlands also provide flood and erosion control benefits, protecting shorelines from erosion and reducing flood damage to downstream property owners. *Id.* at 21-23; CEQ, *Our Nation's Wetlands* at 27; OTA, *Wetlands* at 43-47. It has been estimated that wetlands provide \$140 billion worth of flood and pollution control benefits to society. 123 Cong. Rec. 38,994 (1977) (remarks of Rep. Lehman). Wetlands also retain rainwater, which supplements surface streams or percolates into underground aquifers, thereby increasing water supplies. CEQ, *Our Nation's Wetlands* at 27.

Unfortunately, our understanding of the dynamic ecological functions performed by wetlands and our appreciation for the many benefits (economic as well as biological) they provide have come too late to save the vast bulk of our national wetland heritage. The original wetland acreage of this country, prior to European settlement, totalled approximately 215 million acres in the coterminous United States. Today, our wetland resources

amount to under 99 million acres, or less than 46 percent of our original wetlands. Wetlands of the U.S. at 28-29.<sup>1</sup> The conversion of wetlands to agricultural, residential, and other uses continues at an astonishing pace. Between the mid-1950's and the 1970's, the wetland conversion rate averaged between 450,000 and 550,000 acres per year. Wetlands of the U.S. at 31; OTA, *Wetlands* at 6, 87. Due to declining rates of agricultural drainage and government programs to regulate wetland use, this rate of loss has been curtailed somewhat to about 300,000 acres yearly at present. *Id.* at 11, 87.

Thus, wetlands are a diminishing natural resource of inestimable value to amici and the nation as a whole, in economic as well as biological terms. Amici believe it is imperative that our remaining wetlands be protected from wanton destruction. Rather than adopting their own wetlands protection programs, however, most states traditionally have looked to the federal government for wetlands regulation, particularly away from the coastal zone. Although almost all coastal states have regulatory programs designed to protect coastal wetlands, few have laws protecting

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<sup>1</sup> While these figures for the national decline in wetlands are dramatic, losses in particular regions and states have been even more startling. For example, California has lost over 90 percent of its original wetland resources. Wetlands of the U.S. at 32. In San Francisco Bay, 75 percent of the 313 square miles of historic wetlands have disappeared, while 95 percent of the Bay's tidal marshes have been diked or filled. Fish and Wildlife Service, U.S. Dep't of the Interior & Corps of Engineers, U.S. Dep't of the Army, *The Ecology of San Francisco Bay Tidal Marshes: A Community Profile* 14 (1983). Less than 5 percent of Iowa's natural wetlands remain. Wetlands of the U.S. at 32. Michigan, in which the instant case arose, has suffered the destruction of 71 percent of its original wetland resources. *Id.* at 34. In 1850, Florida possessed over 20 million acres of wetlands; today, that figure has dwindled to about 12 million acres. Gramling, *Wetland Regulation and Wildlife Habitat Protection: Proposals for Florida*, 8 Harv. Envt'l L. Rev. 365, 366 (1984).

inland wetlands, and noncoastal states generally do not have specific wetland programs at all. OTA, *Wetlands* at 13.<sup>2</sup>

California is representative of those states which rely almost completely on the Corps' regulatory jurisdiction under Section 404 to protect inland wetlands. As a coastal state, California has enacted laws protecting coastal wetlands from unrestricted development and conversion along its entire 1,000-mile coastline and in San Francisco Bay. The California Coastal Commission is the principal state agency responsible for conserving and regulating the use of the natural resources of the coastal zone, including wetlands, pursuant to the California Coastal Act of 1976. Cal. Pub. Res. Code §§ 30000-30900. Upland from the coastal zone, however, the Commission has no direct regulatory authority.

Within the confines of San Francisco Bay, the San Francisco Bay Conservation and Development Commission ("BCDC") is responsible for protecting coastal waters from undesirable filling. See Cal. Gov't Code §§ 66600-66661. BCDC has permit jurisdiction over projects in the Bay, certain other water bodies, managed wetlands, and a thin shoreline band around the Bay. *Id.* § 66610. Outside of these boundaries, BCDC has no regulatory control. These jurisdictional limits thus exclude vast expanses of wetland acreage, including diked historic baylands, which were once part of the greater San Francisco Bay system but were isolated from tidal action by diking or filling. The only effective regulatory protection for such wetlands is that provided by Section 404.<sup>3</sup>

<sup>2</sup> Section 404, moreover, is the only federal statute which directly regulates dredging and filling of "adjacent wetlands" (generally, those which extend landward beyond the mean high or ordinary high water mark) such as the property involved in this case. See Want, *Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Envt'l L. Rev. 1, 7-8 (1984).

<sup>3</sup> The other California agencies which have joined in this brief also have special responsibilities for wetland protection under state law. The Attorney General is the chief law enforcement officer of the state with authority to protect natural resources from pollution, impairment, or destruction. Cal. Gov't Code §§ 12600-12612. The California Coastal

California's regulatory scheme is by no means unique. As indicated above, while coastal wetlands are regulated reasonably well, through a combination of state programs and the Corps' 404 program, in most cases the only protection for inland wetlands is that provided by the Corps. OTA, *Wetlands* at 13. Consequently, the issues in this case are of major concern to the states joining in this brief.

#### SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act of 1977 ("CWA"), 33 U.S.C. § 1344, prohibits the discharge of dredged or fill material into waters of the United States, including wetlands, without a permit from the Corps. The United States brought this action to enjoin the unpermitted discharge of fill material into a wetland site owned by the respondent, Riverside Bayview Homes, Inc. ("Riverside"). The district court found a portion of Riverside's property to be a wetland subject to the Corps' regulatory jurisdiction and enjoined further filling of that part of the site without a 404 permit.

Riverside appealed and the circuit court remanded the case to the district court for reconsideration in light of the Corps' revised 1977 definition of wetlands. A second district court judge also ruled for the United States, and Riverside appealed once again. The Court of Appeals, in the decision now under review by this Court, held that Riverside's property was not a wetland under the 1977 regulations and thus not subject to the Corps' 404 permit authority. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984).

The circuit court ruled that the Corps' 404 jurisdiction to regulate the discharge of pollutants into wetlands is restricted to areas which support aquatic vegetation only by virtue of "frequent flooding by waters flowing from 'navigable waters' as defined in the Act." *Id.* at 398. Its rationale for engraving this "frequent flooding" requirement onto the Corps' regulatory definition of

Conservancy makes grants to local public entities and nonprofit organizations to acquire, restore, and enhance valuable wetlands. Cal. Pub. Res. Code §§ 31000-31406.

wetlands was based on both statutory and constitutional constraints. The court questioned whether Congress intended to reach properties having the characteristics attributed to Riverside's land, *id.* at 397-398, 401, and concluded that in any event the Corps' definition must be narrowly construed to avoid what it perceived to be "a serious taking problem under the fifth amendment." *Id.* at 397-398.

Amici contend that the Sixth Circuit's decision is plainly contrary to the intent of Congress in enacting Section 404. Unlike the circuit court, moreover, amici see no constitutional impediments to extending the Corps' regulatory jurisdiction over wetlands to the property owned by Riverside.

Congress declared that the objective of the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this ambitious goal, Congress intended to assert jurisdiction over the nation's waters to the full extent of its powers under the Commerce Clause of the Constitution. This Court has repeatedly held, in an unbroken line of precedent, that the Commerce Clause is a grant of plenary authority which enables Congress to regulate purely intrastate activities as long as it has a rational basis for determining that such activities affect interstate commerce. The legislative history of the CWA, which the Court of Appeals completely ignored, unmistakably demonstrates that Congress not only had a rational basis for determining that the discharge of dredged or fill material into wetlands has major impacts on interstate commerce, but fully intended to reach such activities under Section 404. Congress recognized that wetlands perform essential environmental functions which are inextricably connected to the CWA's central object of purifying the nation's waters. These vital ecological services, in turn, have a social and economic dimension of which our legislators were well aware when they created the 404 program.

The Sixth Circuit's constricted reading of the Corps' regulation certainly was not required by any Fifth Amendment "taking" considerations. Riverside contests the jurisdiction of the Corps over its land and asserts its right to develop the parcel without having to obtain a 404 permit. Thus, the only "taking" issue

which can possibly arise is whether the regulation on its face effects a taking of Riverside's property without compensation. Neither Section 404 nor the implementing regulations necessarily forbid all beneficial use of the tract of land involved here; therefore, because Riverside has not been denied all economically viable use of the parcel, its property has not been taken in contravention of the Fifth Amendment.

Congress vested in the Corps broad jurisdiction to regulate the discharge of dredged and fill materials into adjacent wetlands, unconfined by arbitrary limitations of the sort imposed by the Court of Appeals. The Corps, exercising this congressional grant of authority, adopted a definition of "wetlands" which admirably serves the purposes Congress had in mind when it passed the CWA. By focusing on soil condition, the prevalence of aquatic vegetation, and the presence of abundant moisture (by virtue of either inundation or saturation)—the factors which scientists themselves typically take into account—the Corps' definition takes a biologically sound approach to the problem of identifying wetlands. Furthermore, insofar as the regulation's scope is directed at wetlands in close geographical proximity to streams, lakes, or seas, it properly recognizes the functional link between adjacent wetlands and such waterways.

By narrowly interpreting the Corps' regulation and imparting to it a limitation which neither Congress nor the Corps intended, the circuit court improperly fashioned its own judicial definition of wetlands. In so doing, the court disregarded the well-established rule that the views of an agency charged with administering a complex regulatory statute such as the CWA are entitled to judicial deference. Rather than deferring to the Corps' unquestioned expertise, the Court of Appeals improperly created its own definition, which bears little resemblance to the one adopted by the agency. In sharp contrast to the Corps' scientifically based approach, moreover, the Sixth Circuit's definition has no legitimate scientific basis and would artificially exclude broad categories of wetlands from protection with no rational basis for doing so. The circuit court's definition, in short, is neither good science nor good law.

## ARGUMENT

### I

#### **IN THE EXERCISE OF ITS COMMERCE CLAUSE AUTHORITY, CONGRESS CONFERRED ON THE CORPS BROAD JURISDICTION TO REGULATE THE DISCHARGE OF DREDGED AND FILL MATERIAL INTO "ADJACENT WETLANDS" AS PART OF ITS PROGRAM TO EFFECTIVELY CONTROL POLLUTION OF THE NATION'S WATERS**

The Court of Appeals held that the Corps' Section 404 jurisdiction to regulate the discharge of pollutants into "adjacent wetlands"<sup>4</sup> is restricted to areas which are "frequently flooded" by waters flowing from "navigable waters." *United States v. Riverside*, 729 F.2d at 397-398. Review of the 1972 and 1977 amendments to the CWA and the legislative record surrounding their enactment, however, plainly demonstrates that Congress intended no such limitation. As numerous other circuit courts have recognized,<sup>5</sup> Congress intended to extend the coverage of the Act as far

<sup>4</sup> The Corps' regulations define "wetlands" as follows:

The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1984). The Corps defines "adjacent" thusly:

The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 323.2(d) (1984).

<sup>5</sup> See, e.g., *State of Utah v. Marsh*, 740 F.2d 799, 802 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-916 & n. 33 (5th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-755 (9th Cir. 1978); *Minnesota v. Hoffman*, 543 F.2d 1198, 1200 n. 1 (8th Cir. 1976), appeal dismissed, 430 U.S. 977 (1977).

as permissible under the Commerce Clause of the Constitution. To effectively control pollution of the nation's waters, it adopted a strategy of regulating the discharge of pollutants at the point source. *See EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). In so doing, Congress accorded the Corps broad jurisdiction under Section 404 to regulate the discharge of dredged and fill materials into "adjacent wetlands," unconfined by arbitrary limitations of the sort fashioned by the Court of Appeals.

#### **A. The Corps' Regulation of the Discharge of Dredged and Fill Material in "Adjacent Wetlands" Is Well Within the Scope of Congress' Authority Under the Commerce Clause, and Congress Clearly Intended to Regulate Such Discharges**

##### **1. Congress Has Broad Authority Under the Commerce Clause to Regulate Water Pollution Activities**

Since Congress premised the enlarged scope of federal authority to fully regulate water pollution activities on its authority under the Commerce Clause, we begin with a review of the applicable precedent in this area. This Court has agreed that the power conferred by the Commerce Clause is indeed "broad enough to permit Congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 282 (1981). The constitutional provision is a grant of plenary authority to Congress, and this power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 276, quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824).

In a number of cases the Court has made clear that "the power of Congress to promote interstate commerce also includes the power to regulate the incidents thereof, including local activities in both States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1974); see *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 310-313 (Rehnquist, J., concurring); *Wickard v. Filburn*, 317 U.S.

111, 124-125 (1942). Even if a particular activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as the class, considered as a whole, affects interstate commerce. See *Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *Perez v. United States*, 402 U.S. 146, 154 (1971); *Maryland v. Wirtz*, 392 U.S. 183, 192-193 (1968). As explained in *Perez*: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the *class*." *Perez v. United States*, 402 U.S. at 154, quoting *Maryland v. Wirtz*, 392 U.S. at 193 (emphasis in original). In order to regulate an activity, Congress need only have a rational basis for a determination that the activity affects interstate commerce. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 276.

## **2. The Legislative History of the CWA Demonstrates the Intent of Congress to Exercise Its Fullest Authority Under the Commerce Clause**

Bearing in mind these rules, amici believe the Sixth Circuit fundamentally erred in failing to address in any sense the broad reach of jurisdiction under Section 404 intended by Congress in the exercise of its Commerce Clause authority, and the extensive legislative history of the CWA which makes that intent so abundantly clear. See *Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1, 9-10 (1976). The legislative record plainly demonstrates that Congress, in defining "navigable waters" in the Act to mean "waters of the United States," 33 U.S.C. § 1362(7), fully intended to extend the reach of federal regulatory authority over water pollution activities to a class of activities it deemed to have potentially substantial effects on interstate commerce: the discharge of dredged and fill material into adjacent wetlands.

In furtherance of its principal objective under the Act to restore and maintain the integrity of the nation's waters, Congress expressly stated its intent at the outset "that the term 'navigable waters' be given the broadest possible constitutional interpretation. . ." 1 Leg. Hist. at 327 (S. Rep. No. 1236, 92d Cong., 2d Sess. 14 (1972) (conference report)); see also 1 Leg. Hist. at 178 (remarks of Sen. Muskie); 1 Leg. Hist. at 250-251 (remarks of

Rep. Dingell).<sup>6</sup> The Senate report on the 1972 amendments explained the necessity for a broad definition of "navigable waters," unlimited by traditional concepts of navigability,<sup>7</sup> in order to control discharges at their source:

"The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. *Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source*. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries."

<sup>6</sup> Citations to the Legislative History, unless otherwise indicated, are to Senate Committee on Environment and Public Works, A Legislative History of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973 & 1978), in four volumes.

<sup>7</sup> As used in the traditional sense, "navigable waters" has generally been interpreted for purposes of federal regulatory jurisdiction to include all waters used to transport interstate or foreign commerce, *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1870); used in the past to transport interstate or foreign commerce, *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921); and susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce, *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940). In the 1972 amendments, Congress opted for the broader definition of "navigable waters" contained in the CWA because it was plainly evident that a polluter could adversely affect navigable waters merely by dumping its waste, or dredged or fill materials, into a nonnavigable tributary of navigable waters or into adjacent wetlands. See *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974).

2 Leg. Hist. at 1495 (emphasis added).<sup>8</sup>

In passing the 1977 amendments to the Act, Congress left no doubt about its intent to regulate the discharge of pollutants into wetlands. Efforts by the House to restrict the CWA's reach to waters that are in fact navigable were rejected in 1977. See 3 Leg. Hist. at 281-282. Significantly, the Senate also defeated an amendment proposed by Senator Bentsen which would have limited Section 404 jurisdiction to waters navigable-in-fact and their contiguous or adjacent saline or fresh water wetlands. 4 Leg. Hist. at 901-950. Indeed, the legislative record makes it very clear that when Congress rejected attempts to restrict the Corps' jurisdiction in 1977, it was fully aware of the Corps' regulatory extension of that jurisdiction beyond the traditional definition of "navigable waters" and of the Corps' pending revision of its wetland definition in the disputed regulation before this Court. 4 Leg. Hist. at 920-922 (remarks of Sen. Baker); 3 Leg. Hist. at 347-348 (remarks of Rep. Roberts).

Congress repeatedly emphasized the importance of protecting wetlands as part of its overall strategy for restoring the biological and chemical integrity of the nation's waters. Senator Muskie, one of the primary sponsors of the CWA, explained:

"There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

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<sup>8</sup> With this strategy in mind, the lower federal courts had little difficulty concluding that "adjacent wetlands" were intended by Congress to be "waters of the United States" within the scope of the 1972 amendments to the Act. See *Conservation Council of North Carolina v. Costanzo*, 398 F. Supp. 653, 673-674 (E.D.N.C. 1975); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 674-676 (M.D. Fla. 1974).

"The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve."

4 Leg. Hist. at 869.

Further, the substantial impacts upon the economy and interstate commerce derived from dredging and filling activities in wetlands were forcefully brought home in the remarks of Senators Chafee and Baker. Senator Chafee, in opposing the Bentsen amendment, addressed wetlands as a national asset, "not just confined within boundaries which happen to exist for any one of our States":

"The wetlands perform a vital part of the food chain for our wildlife.

"Mr. President, I call the attention of the Members of the Senate to the fact that 90 percent of the fish and shellfish in the whole Gulf of Mexico, that mammoth body of water, 90 percent of those fish and shellfish spend some part of their life cycle in Louisiana wetlands. More than two-thirds of the cash value of fish harvested along the Atlantic coast is derived from species that depend upon the estuaries.

"In other words, it is a life chain that starts with the tiny little organisms that grow in these marshlands, are generated there, and then go to provide food up through the animal chain.

"As we all know, the New England commercial fishery is vital to our economy. It is one of our more productive industries. For instance, in the State of Maine, in 1975, the last year for which we have figures, nearly \$50 million was the value of the fishing harvest there. Ninety-eight percent of that was made up of species that depended upon the wetlands for some part of their life cycle."

4 Leg. Hist. at 917.

Senator Baker, during that same debate, observed that without wetlands "the cost of abating pollution in this country by industry and municipalities would be enormously increased by the additional costs that would be required by the technology to take the

place of what nature has provided us." 4 Leg. Hist. at 920. He emphasized that:

"... [U]nlike most industrial and municipal pollution, dredged and fill material can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds. These critical aquatic areas are essential to many water uses, not the least of which is a viable commercial and sports fishery."

"Wetlands serve as spawning and nursery areas while providing natural control of organic and inorganic nutrient transfer that dictate quantity and quality of life in the water. The declining availability of swamps, marshes, and free-flowing streams to assimilate pollution from point and nonpoint sources will greatly increase the dollar and energy costs of maintaining desirable water uses."

*Id.* at 921.

Other legislators voiced similar sentiments concerning the economic significance of wetlands. See, e.g., 4 Leg. Hist. at 927 (remarks of Sen. Hart), 1247 (House Comm. Rpt., Additional Views of Reps. Edgar and Myers), 1317 (remarks of Rep. Lehman), and 1320 (remarks of Rep. Bonior).<sup>9</sup>

Finally, consistent with these views, Congress made its intent to reach pollution activities in adjacent wetlands explicit by specifically referring to "wetlands adjacent" to navigable waterways in one of the key provisions added to Section 404 by the 1977 amendments to the Act. See 33 U.S.C. § 1344(g)(1) (addressing state administration of the Section 404 program).

The foregoing therefore amply documents that, recognizing wetlands as a diminishing resource of inestimable value to the nation (in economic as well as biological terms), Congress believed it imperative to protect this resource through the 404 permit program. As for adjacent wetlands specifically, Congress

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<sup>9</sup> The concerns of these legislators, moreover, are well grounded in the facts and statistics detailed in the introductory statement of the Interests of Amici, *supra*, demonstrating the national economic and commercial significance of wetlands.

purposefully determined to regulate, as a class under Section 404, the discharge of dredged and fill materials into such areas, which it regarded as an essential provision to protect the economy and interstate commerce from the substantial effects that may result from that kind of activity.<sup>10</sup> Amici submit the regulation of that class of activities unquestionably represents a valid and rational exercise of Congress' authority under the Commerce Clause.

### 3. The Corps' Definition Implements the Intent of Congress in the CWA

The Corps, in turn, had the intent of Congress, as well as this Court's Commerce Clause precedent, well in mind when it promulgated its final regulation defining "waters of the United States" for purposes of Section 404. 42 Fed. Reg. 37,127 (1977). Rejecting the traditional limits of the "navigable waters" in the case of wetlands, the agency explained in the preamble to the 1977 revision of its regulations:

"The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tideline,

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<sup>10</sup> A number of courts have recognized that discharge of pollutants into the nation's waters, including adjacent wetlands, has the potential for exerting substantial effects on interstate commerce, even where the activity at issue is purely local in nature. These courts have pointed out, for example, that such activities may disrupt the food chain, essential to propagation of fish, shellfish, and other wildlife which could be taken and sold in interstate or foreign commerce, *Utah v. Marsh*, 740 F.2d at 803; *United States v. St. Bernard Parish*, 589 F. Supp. 617, 620 (E.D. La. 1984); impair the attraction of lakes and streams used by interstate travellers for swimming, boating, fishing, hunting, or viewing and appreciating bird and animal life, *Utah v. Marsh*, 740 F.2d at 804; *United States v. Byrd*, 609 F.2d at 1210; or degrade the quality of irrigation waters used for agricultural crops sold in interstate commerce. *Utah v. Marsh*, 740 F.2d at 804; *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979).

will affect the water quality of the other waters within that aquatic system.

"For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

42 Fed. Reg. 37,128 (1977). It thus broadly defined "adjacent wetlands" as "waters of the United States", without the kind of constraint imposed by the Court of Appeals, to ensure that discharge activities in such sensitive areas would in fact receive regulatory scrutiny. That definition, born of the "organic" concept chosen by Congress to further its objective of eliminating the discharge of pollutants into the nation's waters, is wholly in accord with the goals Congress sought to accomplish under the CWA. Cf. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 283 (Surface Mining Act).

The approach of the Court of Appeals stands in stark contrast to the congressional intent underlying Section 404. The court's restriction of the Corps' jurisdiction to wetlands "frequently flooded by waters flowing from the 'navigable waters'" literally makes no sense, when viewed either against the breadth of regulation intended by Congress to combat water pollution or the substantial effects on interstate commerce exerted by the discharge of pollutants in such areas. This perhaps is not surprising given that the court in its opinion simply failed to address either of these factors. Recognizing that "[w]ater moves in hydrological cycles," 2 Leg. Hist. at 1495, Congress also quite clearly sought to regulate, as a particular class of activities, the discharge of pollutants in wetlands which drain by ground or surface water runoff into other adjacent waters. The Corps' wetland definition reaches activities of this sort and therefore achieves precisely the broad extent of jurisdiction intended by Congress to effectively control water pollution by regulating it at its source.

In short, the Court of Appeals seriously erred in its attempt to restrict the scope of the Corps' wetland jurisdiction. Since, in the instant case, the discharge of fill on Riverside's property falls well

within the broad class of activities Congress appropriately sought to regulate under the CWA, it is properly reached under Section 404.

**B. The Sixth Circuit's Narrow Interpretation of the Corps' Regulation Is Not Compelled by the Takings Clause of the Fifth Amendment**

In attempting to justify its narrow construction of the Corps' regulatory authority over wetlands, the Court of Appeals reasoned that its interpretation was compelled by the Takings Clause of the Fifth Amendment to the Constitution. 729 F.2d at 397-398. The Court explained that it took this approach "in order to avoid serious questions concerning the [constitutional] validity of the definition itself" under the CWA. *Id.* at 397. Far from being required by the Fifth Amendment, however, the Sixth Circuit's constricted reading of the regulation reveals an erroneous understanding of this Court's decisions in the takings area.<sup>11</sup>

As the Court has made clear in a series of land use cases, the "taking" question is fundamentally a factual inquiry. *Hodel v.*

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<sup>11</sup> The circuit court expressed the opinion that a restrictive interpretation of the wetlands definition was needed lest the Corps' jurisdictional reach extend to "low lying backyards miles from a navigable waterway". 729 F.2d at 401. We submit, however, that the Corps' definition contains "an adequate limiting principle", *id.*, that makes the court's narrow reading of the regulation wholly unnecessary. First, isolated wetlands not in close proximity to waterways that are in fact navigable are subject to the Corps' 404 jurisdiction only if there is a provable nexus between them and interstate or foreign commerce. See 33 C.F.R. § 323.2(a)(3)(1984). Secondly, in the preamble to its 1977 revision of the regulations, the Corps explained that the term "normally" was inserted into the wetlands definition, in part, to exclude from 404 jurisdiction areas that exhibit an abnormal presence of aquatic vegetation but are not true wetlands. As the Corps interpreted the new definition, "the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37,128 (1977). Thus, the Corps itself has interpreted its own regulation in a manner which remains faithful to Congress' intent in the CWA and falls well within constitutional boundaries, making judicial revision quite unnecessary.

*Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 294-295; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978). In developing the jurisprudence of the Fifth Amendment's Taking Clause, the Court has not developed any "set formula" for determining when public actions resulting in economic injury must be compensated by the government. Instead, it has often observed that whether a particular restriction will be held invalid for the government's failure to compensate the property owner for losses caused by regulatory conduct "depends largely upon the particular circumstances [in that] case." *Penn Central v. New York City*, 438 U.S. at 124, quoting *United States v. Central Eureka Min. Co.*, 357 U.S. 155, 168 (1958). Several factors have been identified as being of particular significance: the economic impact of the regulation in question, the character of the governmental action, and the extent of its interference with "reasonable investment-backed expectations." *Kaiser Aetna v. United States*, 444 U.S. at 175.

None of these "essentially ad hoc, factual inquiries", *id.*, can be addressed in the abstract. They can only be conducted with respect to specific property and with careful attention to the particulars of the economic harm suffered by the property owner in his unique circumstances. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 295. Given the procedural posture in which the instant case arose, the question of whether the 404 permit requirement resulted in a "taking" of Riverside's property cannot be answered. The issue presented here is not whether the Corps' denial of a 404 permit was reasonable under all the circumstances, but whether Riverside must apply for a permit in the first place.<sup>12</sup>

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<sup>12</sup> While this case was on appeal in the Sixth Circuit, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre area it had already filled without authorization by the Corps, and also refused permission to fill an additional 30.6 acres. This permit denial was based on the adverse impact of the fill on the wetland, and the absence of a permit from the State of Michigan. U.S. Pet. 11 n. 8; see 33 C.F.R. § 325.8(b) (1984). Riverside never sought judicial review of this decision, and the Court of Appeals had no occasion to consider whether the

Since Riverside has resisted this requirement on the grounds the Corps has no jurisdiction over its land, the Sixth Circuit's conclusion that its restrictive interpretation of the regulation was dictated by Takings Clause considerations could only have been founded on an implicit judgment that Section 404 or the regulations on their face effect a taking of Riverside's property. The test applied to such a facial challenge is that a statute or regulation limiting the use of property results in a taking if it "denies an owner economically viable use of his land . . ." *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 295-296, quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Section 404 and the Corps' regulations easily survive this test.

The Court of Appeals apparently was laboring under the misapprehension that sanctioning the Corps' assertion of 404 jurisdiction over Riverside's property would be tantamount to approving an absolute prohibition of "any development or change of such property by the landowner". 729 F.2d at 398. Requiring that Riverside obtain a permit from the Corps, however, is not equivalent to forbidding all development. Indeed, the Act itself clearly presupposes that permits will be issued in appropriate circumstances. See 33 U.S.C. § 1344(a) & (b). To assume that requiring a 404 permit would necessarily frustrate the developer's plans, as the lower court apparently did, is to ignore the plain language of the Act.

Moreover, even if one were to assume that Riverside would be unable to obtain a permit for its project, it does not necessarily follow that the corporation would be deprived of any economically viable use of its property. The Act exempts certain categories of discharge entirely, 33 U.S.C. §1344(f)(1), and the regulations provide for permits to be granted for numerous activities and uses. See generally 33 C.F.R. part 330 (1984); 40 C.F.R. part 230 (1984). Thus, since the Act and the regulations, on their face, do not forbid all uses of the property, a taking claim based only on a

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Corps' permit denial was reasonable or effected a taking under the circumstances. Therefore, this question is not presented to the Court here, and in any event Riverside, by its failure to appeal the Corps' administrative determination, has waived any claim that the refusal of a permit effected a taking of its property.

recognition of Corps jurisdiction is premature and cannot be sustained. Cf. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 296-297 (Surface Mining Act does not, on its face, prevent beneficial use of coal bearing lands); see *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 927; *United States v. Byrd*, 609 F.2d at 1211; *United States v. Ciampitti*, 583 F. Supp. 483, 495-496 (D.N.J. 1984).<sup>13</sup>

The only authority relied upon by the Sixth Circuit in analyzing the "taking" issue was *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Not only are the "parallels" between the case at bar and *Kaiser Aetna* not "obvious", as the lower court asserted, that decision does not even remotely suggest that a narrow view of the government's regulatory jurisdiction under the CWA is required to avoid a constitutional problem. The Court in *Kaiser Aetna* was concerned with the proper scope of the government's traditional navigational servitude, and the issue was whether that servitude negated any private property interest in navigable waters. In rejecting the argument that the navigational servitude necessarily immunizes the government from a Fifth Amendment taking claim, the Court remarked that applying the navigational servitude to create a public right of access would "result in an actual physical invasion of the privately owned marina" and held that the government's assertion of such a right of access "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking". *Id.* at 178, 180.

In the instant case, by contrast, we are not presented with any physical invasion of Riverside's property by the government. Nor

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<sup>13</sup> Even if a taking were found here, Riverside would have no constitutional complaint unless appropriate relief were unavailable. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 297 n. 40. Presumably, if the denial of a 404 permit were held to be a taking, Riverside would have a remedy by way of either an action in the U.S. Court of Claims, 28 U.S.C. § 1491, or judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. See *Buttrey v. United States*, 690 F.2d 1170, 1183-84 (5th Cir. 1982), cert. denied, 103 S.Ct. 2087 (1983); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). No showing to the contrary was made by Riverside or by the Court of Appeals.

does the Corps' mere assertion of regulatory jurisdiction "extinguish a fundamental attribute of ownership". *Agins v. Tiburon*, 447 U.S. at 262. In fact, the Court in *Kaiser Aetna* expressly acknowledged the government's rightful authority to regulate the navigable water involved there in order to protect navigation and promote commerce, without "taking" private property in contravention of the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. at 174, 179. This Court's holding in *Kaiser Aetna*, therefore, provides no support for the Sixth Circuit's taking analysis.

In short, the application of the CWA to Riverside's property creates no conflict with the Takings Clause. The "serious questions" about the constitutional validity of the Corps' definition of wetlands which concerned the Sixth Circuit, on close examination, present little difficulty, particularly in the procedural context in which this case comes before the Court. Fifth Amendment "taking" considerations thus do not compel the overly restrictive interpretation of the Corps' regulations which the Court of Appeals adopted.<sup>14</sup>

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<sup>14</sup> Riverside also maintained in the court below that subjecting its property to regulation under Section 404 would contravene the Congressional policy expressed in the CWA that the primary responsibility for land use decisions should continue to reside with state and local governments. See 33 U.S.C. § 1251(b). Riverside's fear that defining its property as a "wetland" for Section 404 purposes would inject an unwarranted federal presence into an area better left to the states is unfounded. In the first place, to equate wetlands protection with local land use controls is to confuse the well-defined and specific objectives of the former—water quality protection, flood prevention, groundwater recharge, fish and wildlife conservation—with the more general concerns of the latter. Unlike local zoning and other land use decisions, activities subject to 404 regulation often have effects far removed from the local jurisdiction. Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, 18 Land & Water L. Rev. 469, 472-473 (1983). More importantly, federal control over dredging and filling is largely a matter of choice for individual states, inasmuch as they have the option of administering part of the 404 permit program themselves within their jurisdictions. 33 U.S.C. § 1344(g).

## II

**THE COURT OF APPEALS ERRED IN NOT DEFERRING TO THE CORPS' TREATMENT OF "ADJACENT WETLANDS" AS "WATERS OF THE UNITED STATES" AND IN SUBSTITUTING ITS OWN WETLAND TEST FOR THAT OF THE AGENCY**

As a consequence of its constricted interpretation of the Corps' wetland definition, the Court of Appeals, in effect, fashioned its own wetland test—a test which bears little resemblance in either form or substance to the one adopted by the agency. In so doing, it plainly erred in not deferring to the Corps' definition and in substituting its own judicially created version. The record in this case readily supports the district court's ruling that Riverside's discharge activities fell properly within the scope of the Corps' regulatory jurisdiction.

This Court has recently confirmed the long-standing rule that the views of an agency charged with administering a complex statute such as the CWA are entitled to judicial deference, and moreover that a court may not substitute its own construction of a statutory provision for a rational one made by the agency. *Chemical Mfrs. Ass'n v. NRDC*, 105 S.Ct. 1102, 1108 (1985); *Chevron USA, Inc. v. NRDC*, 104 S.Ct. 2778, 2782-2783 (1984); *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975).

Under the CWA, Congress delegated substantial discretion to the Corps to implement the 404 permit program. The final wetland definition promulgated by the agency in 1977 was developed in response to numerous comments concerning its earlier interim definition, and after drawing upon its special expertise in wetlands regulation and the expertise provided by the Departments of Interior and Agriculture and the Environmental Protection Agency ("EPA"). 42 Fed. Reg. 37,128 (1977); *see also Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 911 n. 27. EPA has added the same definition to its 404 guidelines. 40 C.F.R. § 230.3(t) (1984). While adopted for jurisdictional purposes, the definition blends scientific and technical factors—vegetation, soil, and hydrology—into a convenient and workable methodology for identifying wetlands. Furthermore, it

bears repeating that during the debates over the 1977 amendments to the CWA, Congress was well aware of the broad reach of this wetland definition and fully embraced it. *See 4 Leg. Hist. at 920-922 (remarks of Sen. Baker); 3 Leg. Hist. at 347-348 (remarks of Rep. Roberts)*.

Accordingly, the Court of Appeals should have given the Corps' definition the deference required under the well-established rules outlined above. In essentially rewriting the regulation instead, it clearly misconceived its role. Its interpretation would substitute for the Corps' scientifically based definition one that is patently artificial, unworkable, and unpredictable. As discussed below, the court departed from the Corps' definition in three significant respects, the result of which would be the exclusion of broad categories of adjacent wetlands from 404 regulation.

First, the Corps' definition addresses lands that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support" aquatic vegetation. 33 C.F.R. § 323.2(c) (1984). In its discussion, however, the circuit court completely ignored saturation and focused exclusively on inundation as the essential source of water in classifying an area as a wetland. Moreover, it compounded this error throughout its opinion by misquoting the regulatory definition, conspicuously omitting the words "or saturated by surface or ground water." *See 729 F.2d at 396-398.*

From a scientific point of view, it is the presence of water in the soil or substrate of a particular duration and frequency—regardless of how it got there—which determines the ability of plants to grow in and dominate an area. As the U.S. Fish and Wildlife Service has explained:

"Wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of land and animal communities living in the soil and on its surface. The single feature that most wetlands share is soils or substrate that is at least periodically saturated with or covered by water. The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or in saturated soil."

Fish and Wildlife Service, U.S. Dep't of the Interior, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979).

The disjunctive nature of the Corps' definition is thus particularly appropriate given the variability of hydrologic regimes controlling waters throughout the nation. Nowhere is this more evident than in California where, along its 1,000-mile coastline, wetlands exist on a continuum between wet and alternating wet and dry conditions. In the northern portions of the state, flooding (inundation) may be the primary source of waters giving rise to a wetland area. In the drier, southern half of the state, by contrast, wetlands are more likely to be sustained by virtue of ground water saturation or surface water runoff as a result of precipitation. See California Coastal Commission, Statewide Interpretative Guidelines for Wetlands and Other Wet Environmentally Sensitive Habitat Areas 33, 78 (1981). Under the Corps' definition, both would properly be reached by Section 404 regulations. The test created by the Court of Appeals, on the other hand, would simply cleave wetlands of the latter kind out of the agency's definition.<sup>15</sup>

The second major flaw in the Court's test is the requirement that flooding from the navigable waters must be "frequent". There is no such requirement in the Corps' wetland definition. Indeed, while noting that the Corps eliminated in its final regulation the element of "periodic" inundation contained in its previous definition, 729 F.2d at 395, the court in its holding appears to resurrect that very requirement.

The record in this case well underscores the difficulty the first district court judge had in addressing the question of whether Riverside's property was "periodically inundated." Pet. App. 25a-31a. The Corps was particularly aware of that difficulty and

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<sup>15</sup> The Corps' definition, because it covers both saturation and inundation, also furthers congressional recognition that protection of the wetlands of the United States requires "an 'organic' concept of the national aquatic system" and thus "a permit system with 'no gaps' in its protective measures." *United States v. Huebner*, 752 F.2d 1235, 1240 & n. 9 (7th Cir. 1985). The Sixth Circuit's test does not begin to address that congressional intent.

indeed of the district court's decision in preparing its final wetland regulation. 42 Fed. Reg. 37,124 & 37,128 (1977). To provide greater clarity for both landowners and regulators, the agency intentionally revised its definition to eliminate the requirement of showing inundation "over a record period of years".<sup>16</sup> The circuit court's test nonetheless would reintroduce such a requirement and the very uncertainty created under the Corps' earlier test. It gives no guidance whatsoever concerning how frequent is "frequent" or, for that matter, what hydrologic proof would be required merely to determine whether an application for a 404 permit must be made to the Corps for a particular discharge activity.

Lastly, the court's holding is completely off the mark in its requirement that to subject an "adjacent" wetland to 404 regulation, not only must it be "frequently flooded", but the flooding must flow *from* the navigable waters. This limitation arbitrarily excludes from 404 regulation wetlands feeding, rather than fed by, adjacent streams, lakes, or seas. It would therefore place outside the Corps' jurisdiction discharge activities having a clear and direct impact upon the quality of such waterways—a result Congress clearly did not intend.<sup>17</sup> Congress rejected such artificial

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<sup>16</sup> The Corps explained in the preamble to the 1977 revision of its regulations:

"This definition is intended to eliminate several problems and achieve certain results. The reference to 'periodic inundation' has been eliminated. Many interpreted that term as requiring inundation over a record period of years. Our intent under Section 404 is to regulate discharges of dredged or fill materials into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. . . ."

42 Fed. Reg. 37,128 (1977).

<sup>17</sup> Although the instant case involves wetlands "adjacent" to waterways that are navigable-in-fact, it should be recognized that the Sixth Circuit's holding would deprive the Corps of jurisdiction over isolated wetlands, as well. The latter serve crucial ecological functions in their own right. In Nebraska, for example, most wetlands are isolated from

limitations, recognizing that “[w]ater moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source.” 2 Leg. Hist. at 1495; *see also Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d at 915; *United States v. Ashland Oil*, 504 F.2d at 1329.

To summarize, therefore, in contrast to the test created by the circuit court, the Corps’ wetland regulation provides a biologically sound, workable methodology for identifying wetlands. It is consistent with and facilitates the means Congress has chosen to control water pollution. The Court of Appeals should have deferred to that regulation.

Applying the regulation to the facts of this case, moreover, we see that the record amply demonstrates that the property at issue is a wetland. Riverside’s property is located but 200 feet from Black Creek, a navigable tributary of Lake St. Clair. Pet. App. 23a-24a. In addition, it is approximately one mile from Lake St. Clair, a significant commercial waterway linking the Upper and Lower Great Lakes with a 27-foot seaway channel. JA 17; *see Hoopengarner v. United States*, 270 F.2d 465, 471 (6th Cir. 1959). The principal use of this lake and its shoreline is recreational, including boating, fishing, and seasonal waterfowl hunting. JA 17.

The record shows that Riverside’s property is part of a larger wetland system that borders Lake St. Clair. JA 16-20, 58. Further, it is part of an undeveloped area that runs to Black Creek, which has exhibited wetland vegetation and saturated soils for decades. JA 51-53, 56, 58-59, 64-65, 67-68, 70-71. Significantly, the evidence below made clear that the unfilled portions of Riverside’s parcel itself are characterized by the prevalence of wetland vegetation that both requires and is supported by saturated soil conditions. JA 26, 28-29, 33, 35, 39-42, 47-48, 55, 77. Finally, expert testimony described the environmental functions of this area as providing habitat for muskrats and birds and

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surface tributaries of traditionally navigable waters, but they are nonetheless of vital importance to migrating sandhill cranes and waterfowl in the Central Flyway. *See Wetlands of the U.S.* at 46-48.

furnishing food resources for fish in nearby Lake St. Clair. JA 39-42, 55, 62-63, 72, 75-76.

This evidence fully supports the conclusion reached by the district court that large portions of Riverside’s property constitute “adjacent wetlands” and thus “waters of the United States”, as defined by the Corps in its regulations implementing the 404 permit program. Amici therefore submit that the trial court was correct in its determination that Riverside’s discharge activities are subject to the Corps’ 404 permit jurisdiction.

## CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Court of Appeals should be reversed.

DATED: May 6, 1985.

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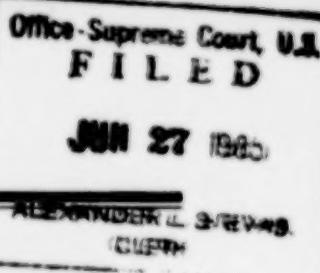
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No. 84-701



IN THE  
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BRIEF OF AMICI CURIAE  
CITIZENS OF CHINCOTEAGUE  
FOR A REASONABLE WETLANDS POLICY  
IN SUPPORT OF RESPONDENTS

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## **QUESTION PRESENTED**

To what extent are wetlands “waters of the United States” within the meaning of § 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7), and therefore subject to federal regulatory jurisdiction.

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BRIEF OF AMICI CURIAE  
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IN SUPPORT OF RESPONDENTS

---

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2, the Citizens of Chincoteague for a Reasonable Wetlands Policy file this brief as amici curiae in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the Clerk.

No area of the United States is more directly affected by the issue of federal regulation of the discharge of fill material onto wetlands under the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, than the Island of Chincoteague, Virginia. Chincoteague is the beneficiary of a substantial seafood industry which is dependent upon clean water and productive wetlands. Chincoteague is also dependent upon its tourist industry which requires reasonable utilization of its limited land mass. As a barrier island, Chincoteague is composed of a continuous series of upland ridges and lowland swales oriented north

to south. The lowland swales collect rain water run off which, combined with a high seasonal water table, results in ground water at or near the surface. These conditions, which change from year to year and from season to season, combined with a generally flat topography, make drainage difficult and result in vegetation commonly associated with fresh water wetlands. The topography of Chincoteague makes the upland ridges useless for reasonable economic development unless the low lying swales can also be filled. Without a reasonably balanced wetland policy which protects the waters for the fishing industry and at the same time permits development of the island land mass for its tourist industry, serious economic damage will result to the citizens of Chincoteague.

The Citizens of Chincoteague for a Reasonable Wetlands Policy is an unincorporated, non-profit organization of Chincoteague residents who have become concerned with the effect of the Section 404 program on the Island of Chincoteague. This brief is paid for by contributions from the citizens of Chincoteague because of their fear that the financial and legal resources of the Petitioner, United States of America (hereinafter "Government"), and amici curiae National Wildlife Federation, et al. (hereinafter "NWF"), could result in a decision which does not consider the interests of affected small property owners.

The Government and the NWF claim that the Sixth Circuit's decision threatens the future ability of the federal government to "protect ecologically important wetlands" (Pet. Brief at 14). They do not acknowledge that the wetlands which are the subject of this case, and which they "seek to preserve", are owned by individual citizens who under the Constitution have a protected and, therefore, vital interest in the proper resolution of this case.<sup>1</sup>

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<sup>1</sup> See, *Summa Corporation v. California ex rel. State Lands Commission and City of Los Angeles*, No. 82-708, 80 L.Ed. 2d 237 (April 17, 1984), where the Court recognized limits to intrusive governmental interference with private property rights.

### STATEMENT

Riverside's land is comprised of one sixty acre parcel and a partially adjoining twenty acre parcel. The sixty acre parcel adjacent to Jefferson Avenue had been actively farmed through the early 1900's. (Pet. App. 22a). In 1916, it was platted as a subdivision, storm drains and fire hydrants were installed. (Pet. App. 22a). The adjacent twenty acre parcel has not been platted. In 1973, because of unprecedented high water levels in Lake Saint Clair, a dike was installed across the property, ditches were filled, and water was pumped onto Riverside's property, disrupting the normal drainage patterns. (Pet. App. 3a). As a result, a cattail swamp developed on that portion of the property which no longer had proper drainage. (Pet. App. 29a).

Expert witnesses testifying at trial stated that the soil type and lack of proper drainage caused the wetland conditions found at the property. (Pet. App. 24a, 25a). Hydrologic studies conducted on the property yielded conflicting results: one expert being of the opinion that there was a hydrologic connection between Lake Saint Clair and the property, while another expert testified that there was no hydrologic connection. (Pet. App. 24a). The District Court found as a matter of fact that there was no hydrologic connection between the property and Lake Saint Clair. (Pet. App. 25a, 37a).<sup>2</sup>

The District Court had great difficulty applying the Section 404 regulations to the facts in Riverside's case. Judge Kennedy, recognizing that her decision was of necessity "somewhat arbitrary",<sup>3</sup> held that under the

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<sup>2</sup> The Government, after failing in the District Court to raise the issue of "saturation", as defined in the Corps regulations at 33 C.F.R. 323.2(c) asks this Court for the first time on appeal to address this issue. (Pet. Brief at 44-45) Such a request by the Government comes too late and this Court is not in a position to make a finding of fact not made by the District Court.

<sup>3</sup> The District Court was immediately confronted with a central issue presented to this Court by the Government and NWF, i.e., when science and constitutional limitations are in conflict, should

1975 regulations Riverside's property above elevation 575.5 was uplands and that portion of the property below qualified as wetlands. (Pet. App. 31a). Judge Kennedy further held that areas of Riverside's property landward of the 575.5 elevation line could be filled despite the existence of wetlands vegetation and other wetlands characteristics. (Pet. App. 31a).

While the case was on appeal to the Sixth Circuit, the Army Corps of Engineers (hereinafter the "Corps") revised its Section 404 regulations. The Corps' new wetlands definition eliminated the requirement of periodic inundation and required only saturation by surface waters, which can be tide, flood or rainwater and ground water. The Sixth Circuit remanded the case for a factual determination applying the Corps' 1977 wetlands definition. (Pet. App. 42a). On remand, Judge Gilmore, without hearing additional evidence, determined that "as redefined by 33 C.F.R. 323.2(c), the Army Corp of Engineers definition of 'waters of the United States' is broader than its predecessor". (Pet. App. 43a). Judge Gilmore reaffirmed Judge Kennedy's ruling that all lands below elevation 575.5 were subject to jurisdiction under the Clean Water Act, 33 U.S.C. 1344, and the Corps' 1977 regulations. (Pet. App. 43a).

On appeal the Sixth Circuit held that "neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former." (Pet. App. 10a). The Sixth Circuit held that the proper interpretation of the words "inundated at a frequency and duration sufficient to support, and that under normal circumstances (does) support wetlands vegetation" requires frequent flooding by waters flowing from "navigable waters" as defined in the Act. (Pet. App. 10a,

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the requirements of the constitution bend to accommodate science or must science bend to accommodate constitutional limitations. (Pet. Brief at 37-39; NWF Brief at 18-21). As further discussed below, Congress cannot extend its regulatory authority beyond the authority granted it under the Constitution.

15a). Accordingly, the Sixth Circuit held that the definition applies to marsh, swamps and bogs directly created by such waters, but not inland low lying areas such as the one in question in this case, which sometimes become saturated with water. (Pet. App. 15a).

#### SUMMARY OF ARGUMENT

The Citizens of Chincoteague believe that the decision of the Sixth Circuit is correct and should be affirmed as it recognizes the distinction between *inundated* wetlands formed by waters of the United States, a prerequisite if jurisdiction is to exist under the Commerce Clause of the Constitution, and *non-inundated* wetlands formed by ground or surface water in association with poor drainage which are beyond the reach of the Commerce Clause. Reversal by this Court would effectively remove any barriers to federal regulation under the Commerce Cause and leave it a legal concept in name only. The Sixth Circuit's decision recognizes and reasonably balances the competing environmental concerns while preserving the integrity of the Commerce Clause. *Inundated* wetlands directly formed by waters of the United States constitute the major significant wetlands having characteristics generally accepted as most valuable to the environment as a whole, while *non-inundated*, isolated wetlands of the type located upon Riverside's property have the least. Finally, the Sixth Circuit's decision, while not so holding, recognized the real danger of unconstitutional takings resulting when authority under the Commerce Clause is exceeded and the regulations and permitting process developed under the Clean Water Act are used as a vehicle to ensure preservation of wetlands located upon private property, rather than to promote Congress' water quality goals.

**I. WHEN CONGRESS PASSED THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS IN 1972, THE EXPRESS PURPOSE OF THE ACT WAS TO CONTROL POLLUTION OF THE NATION'S WATERS AT THE POINT SOURCE AND NOT TO ESTABLISH A FEDERAL LAND USE PROGRAM TO PRESERVE WETLANDS.**

The Federal Water Pollution Control Act Amendments of 1972 (hereinafter FWPCA), 33 U.S.C. 1251 *et seq.*, were enacted to ". . . restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As the statutory goals in the FWPCA expressly demonstrate, Congress was concerned with water quality. *See, e.g.*, 33 U.S.C. 1251(a) (1) ("That the discharge of pollutants into the navigable waters be eliminated by 1985.") To achieve these goals, the FWPCA provided for federal regulatory supervision over water polluting activities from point sources: Section 402, 33 U.S.C. 1342, established the national pollutant discharge elimination system (NPDES) to apply effluent standards for particular discharges; Section 403, 33 U.S.C. 1343, established a program to regulate ocean dumping; Section 404, 33 U.S.C. 1344, established a permitting process to regulate the discharge of dredge and fill material into navigable waters. It is this latter program, Section 404, which is at issue in the instant case.

Section 301(a) of the FWPCA, 33 U.S.C. 1311(a), makes it unlawful to discharge any pollutant into the waters of the United States without a Section 402 (Rivers and Harbors Act, 33 U.S.C. 401-413) or Section 404 (FWPCA dredge and fill) permit. Pollutant is defined in Section 502(6) of the FWPCA, 33 U.S.C. 1362 (6), when it is ". . . discharged into waters." Section 404 provides that "the Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the dis-

charge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344.<sup>4</sup>

Section 502(7) of the FWPCA, 33 U.S.C. 1362(7), defined "navigable waters" as "the waters of the United States, including the territorial seas." The Corps, pursuant to its authority under the FWPCA, published regulations defining its jurisdiction over "navigable waters" as extending to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future, susceptible for use for purpose of interstate or foreign commerce." 33 C.F.R. 209-120(d)(1) (1974).

In 1975, in ruling on a suit brought by the National Resources Defense Council and the National Wildlife Federation against the Secretary of the Army, the District Court for the District of Columbia issued a short opinion granting partial summary judgment. In its brief discussion of the scope of the Corps' regulations under Section 404, the court stated:

Congress, by defining "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et. seq. (the "Water Act") to mean "the waters of the United States, including the territorial seas", asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability. [NRDC v. Callaway, 392 F.Supp. 385, 386 (D.D.C. 1975)]

While explicitly acknowledging that the regulatory authority of Congress was limited by the Commerce Clause and making no reference to wetlands, the Court ordered

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<sup>4</sup> The Corps administered the Rivers and Harbors Act, 33 U.S.C. 401-413, while the Environmental Protection Agency (hereinafter "EPA") was given general responsibility for administering the FWPCA. To eliminate the potential jurisdictional overlap and maintain the Corps' traditional jurisdiction, the Corps was given authority to issue Section 404 permits. 118 Cong. Rec. 33699 (1972).

the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Id.* at 386. The Corps did not appeal this order and the District Court did not rule upon the constitutionality of the resulting regulations.

The Corps responded by publishing interim regulations in July of 1975 to "phase-in" expansion of its Section 404 jurisdiction. In administratively defining "navigable waters", the 1975 regulations, for the first time, included certain wetlands as "waters of the United States" and, therefore, subject to Section 404 jurisdiction. As explained in the regulations, "waters of the United States" included:

(b) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth or reproduction.

\* \* \* \*

(h) Freshwater wetlands including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support vegetation. "Freshwater wetlands" means those areas that are inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction. [33 C.F.R. 209.120(d)(2)(1975)]

On July 19, 1977 the Corps promulgated new regulations that again expanded the Section 404 permit jurisdiction over wetlands not previously defined as falling within the term "waters of the United States".<sup>5</sup> They

<sup>5</sup> While the Government contends that the Corps simply "revised the 1976 interim final regulations to clarify many of the definitional terms" (Govt's Brief at 6), it is clear that the 1977 regulations greatly expanded the Corps jurisdictional authority. On remand from the Sixth Circuit, the District Court explicitly concluded that "as redefined by 33 C.F.R. 323.2(c), the Army Corps of Engineers'

defined "navigable waters of the United States", at 33 C.F.R. 323.2(a), as encompassing (1) traditionally navigable waters, (2) the tributaries of all such navigable waters, (3) interstate waters, whether or not navigable, (4) the tributaries of all such waters, and (5) "all other waters of the United States not identified in paragraphs (1)-(4) above . . . the degradation or destruction of which could affect interstate commerce", 33 C.F.R. 323.2(a)(1-5) (1977). Further, all "adjacent wetlands" to the waters defined in paragraphs (1)-(4) were included as "waters of the United States". These terms were defined in the regulations as:

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands". [33 C.F.R. 323.2(c) and (d) (1977)]

*Amicus curiae* contend, that Congress' failure to clearly define the term "waters of the United States", and the subsequent incorporation by federal agencies of an overbroad definition of "wetlands" into that term, renders enforcement of the FWPCA unconstitutional. Because Congress failed to establish jurisdictional limits to the Section 404 program, leaving the executive branch of government to do so by regulation, this Court must not permit federal agencies to overstep their Constitutional authority and extend federal regulatory jurisdiction beyond permissible bounds.

definition of 'waters of the United States' is broader than its predecessor". (Pet. App. 43a)

**A. The Corps' extension of its Section 404 jurisdiction to all wetlands "saturated by surface or ground water" resulted from the unconstitutional delegation of Congress' legislative function to the executive and judicial branches of Government.**

As mentioned previously, Congress intended that the FWPCA<sup>6</sup> be enforced to the "maximum constitutional limit", but it left the Corps to define its own jurisdiction. *Amicus curiae* contend that the failure of Congress to prescribe jurisdictional limits constitutes a fatal constitutional flaw.

In enacting the 1972 Amendments to the Clean Water Act, Congress failed to "lay down . . . an intelligible principle to which [an executive agency] is directed to conform," thereby unconstitutionally delegating its legislative power. *Hampton & Co. v. United States*, 275 U.S. 400, 409 (1928). By simply redefining "navigable waters" as "waters of the United States, including the territorial seas", 33 U.S.C. 1362(7), Congress failed to provide such an intelligible principle. Courts have recognized the lack of guidance and expressed their frustration with Congress' overbroad delegation. See, e.g., *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983) ("It may be that the extravagant reach of the regulations would raise serious problems under some . . . situations."); *Froehlke v. Leslie Salt Co.*, 578 F.2d 742, 756 (9th Cir. 1978) ("We express no opinion on the outer limits to which the Corps' jurisdiction under the FWPCA might extend").

Throughout its brief, the Government fails to appreciate that Congress may not "abdicate or transfer to others the essential legislative functions with which it is vested." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1939). Congress has never included wetlands within the definition of waters to be regulated under the Clean Water Act. The first efforts by the Corps

<sup>6</sup> The 1977 Amendments to the FWPCA changed the popular name of the FWPCA to the Clean Water Act, which will be used henceforth.

to regulate the discharge of dredged or fill material onto wetlands came not from a specific legislative directive from Congress, the body elected by the citizens and charged by the Constitution with that responsibility, but from a federal regulatory agency itself. See, 40 Fed. Reg. 31320 (1975).

The Government makes much of the fact that Congress passed Amendments to the Clean Water Act in 1977. The Government asserts that Congress thereby ratified the Corps' regulations of July 19, 1977 extending Section 404 jurisdiction over land characterized by "saturated soil" conditions, contending that Congress retroactively expressed its intent that the Corps exercise jurisdiction over all "wetlands". (Pet. Brief at 25). In support of this proposition, the Government cites *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), in which this Court upheld the FCC's regulations concerning fairness in broadcasting requirements. This case is readily distinguishable, however, as the Court's opinion stressed that "Congress has not just kept its silence by refusing to overturn the administrative construction, but has *ratified it with positive legislation*". 395 U.S. at 381-382. (Emphasis added) The Court went on to state:

When the Congress ratified the FCC's implication of a fairness doctrine in 1959, it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go that far. 395 U.S. at 385 (Emphasis added)

The 1977 Amendments did not mention in any way the Clean Water Act's definition of "navigable waters". The only mention of wetlands came in an administrative provision allowing for state assumption of the Section 404 program, 33 U.S.C. 1333(g). Nowhere in the Clean Water Act has Congress implied that land with no connection to "navigable waters" be encompassed by the Section 404 program. Unlike the *Red Lion* case, Congress

has never positively addressed the Corps' Section 404 jurisdiction, let alone through legislative act ratified the Corps' interpretation of its jurisdiction. There are, however, interesting parallels between the issues before the Court in *Red Lion*, and the instant case. If this Court is to uphold the Corps' extension of its Section 404 jurisdiction to all private property characterized by saturated soil, from whatever cause, the private property of all landowners will be turned into a public trust just as surely as were the airwaves in *Red Lion*.

The Government also cites *Bob Jones University v. United States*, 461 U.S. 574 (1983), in support of its proposition that Congress retroactively expressed its intent to extend Section 404 permit jurisdiction to land characterized by "saturated soil." The cited portion of *Bob Jones*, however, stands only for the unremarkable proposition that the general words of a statute cannot be construed to defeat the intent of Congress and that the interpretation of the regulatory agency charged with administering a program is due proper deference from a reviewing court. 461 U.S. at 599-602. The Government's reliance upon the *Bob Jones* decision is misplaced, as the Government fails to acknowledge that the principle of deference to an agency's interpretation is inappropriate where that interpretation has not been consistent. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *SEC v. Sloan*, 436 U.S. 103, 121 (1978). As the Corps' regulations clearly demonstrate, the Corps has been far from consistent in its interpretation of its Section 404 jurisdiction over wetlands.

It is a settled principle that Congress cannot manifest its intent through silence. *Regional Rail Reorganization Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967). Had Congress intended Section 404 jurisdiction to extend to "wetlands" not connected to "navigable waters" it would have so provided. At no time, however, has Congress done so. Congress has never expressed an intention that the Clean Water Act be used to assert federal juris-

diction over non-inundated land unconnected to "navigable waters".

Congress' failure to provide "an intelligible principle" to guide the federal regulatory agencies charged with administering the Clean Water Act has resulted in the "abdication" of its "essential legislative function", rendering the application of the Section 404 program unconstitutional. Congress, not the Corps, must make the policy choices required in national legislation.

**B. The 1977 regulations extended federal regulatory power beyond the permissible limits of the Commerce Clause.**

The Government's position before this Court represents an attempted assertion of federal regulatory authority that exceeds the permissible limits of the Commerce Clause. The July 19, 1977 Corps regulations have completely forsaken the requirement of a nexus between interstate commerce and legislative purpose required by the Constitution.

The Commerce Clause states that Congress may "[r]egulate Commerce with foreign Nations and among the several states, and with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3. To say that Congress intended that "navigable waters be given the broadest possible constitutional interpretation", 118 Cong. Rec. 33699 (1972) and that the Clean Water Act be enforced to the "maximum extent permissible under the Commerce Clause," *Callaway, supra*, at 856, is to definitionally acknowledge that there are constitutional limits upon Congress' Commerce Clause powers.

In *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), this Court delineated the function of judicial review of Commerce Clause legislation as a determination of whether Congress has a rational basis for "finding that a regulated activity affects interstate commerce" and whether the means Congress has chosen are "reasonably adapted to the end permitted by the Constitution". *Hodel*, 452 U.S. at 276, citing

*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 262 (1964). In articulating this test the Court noted that mere invocation of the Commerce Clause will not trigger federal jurisdiction. Instead, "Congress must show that the activity it seeks to regulate has a *substantial effect on interstate commerce*". 452 U.S. at 313 (Rehnquist, J., concurring) (Emphasis added).

The *Hodel* Court respected long standing precedent in holding that:

In light of the evidence available to Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a rational basis for concluding that surface coal mining has *substantial effects on interstate commerce*. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, at 280 (1981) (Emphasis added)

Congress cannot regulate an activity without a demonstration that the activity "affects" commerce in some meaningful way. *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (Congress may not "use a relatively trivial impact on commerce as an excuse for a broad general regulation of state or private activity"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 258 (local activities which have "a substantial and harmful effect upon that commerce" may be federally regulated); *Wickard v. Filburn*, 317 U.S. 111, 125 (1944) (local activity may be regulated if "it exerts a substantial economic effect on interstate commerce").

This Court cannot sustain the Corps' overbroad wetland regulations, subjecting to Section 404 permit jurisdiction all private land "saturated by surface or ground water", as a proper exercise of Congress' Commerce Clause powers. While the Corps' regulations ostensibly demonstrate concern to preserve wetlands for their "ecological" and "habitat" value, Congress has never determined that the discharge of dredge or fill material onto lands "inundated or saturated by surface or ground water" is an activity that "affects" interstate commerce,

substantially or otherwise, or has any effect upon water quality, its stated legislative goal.

As previously discussed the Clean Water Act, as amended by Congress in 1972, regulates the discharge of pollutants from point sources into the navigable waters. As Congress' concern was water quality "navigable waters" was statutorily defined as "waters of the United States", 33 U.S.C. 1362(7), in order to extend the reach of the Clean Water Act further than the traditional definition of navigable waters.<sup>7</sup> At no time, however, did Congress express its intention that all wetlands, let alone land "saturated by surface or ground water", be subjected to the Section 404 permitting process.

The Corps' 1977 redefinition of wetlands to include areas of vegetation resulting from "surface or ground water", including isolated wetlands such as those in the instant case, represents a substantial increase in alleged federal jurisdiction to include much of the land mass of the United States. This regulation constitutes a clear and distinct break of the Commerce Clause nexus and places under federal regulatory jurisdiction all wetlands regardless of their connection to the navigable waters of the United States. By administrative regulation, not legislation, these wetlands are now included within the term "waters of the United States".

*Amicus curiae* believe that the Sixth Circuit's decision holding that those areas subject to federal regula-

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<sup>7</sup> The Corp's traditional jurisdiction over navigable waters, codified at 33 C.F.R. 323.2(b), was developed from this Court's decisions in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (waters navigable in fact and used, or susceptible of use, in their ordinary condition, for commerce); *The Montello*, 87 U.S. (21 Wall.) 430 (1874) (extended to waters capable of use, though not actually used, in commerce); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921) (non-navigable portions of navigable water-bodies); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) (waters that, through reasonable improvement, could be made navigable); and, *Oklahoma ex rel. Phillips v. Guy F. Atcheson Co.*, 313 U.S. 508 (1941) (non-navigable tributaries of navigable waters).

tory jurisdiction must be limited to areas so frequently inundated by waters of the United States as to make them also a part of waters of the United States is correct. To rule otherwise would ignore the fact that Congress has never determined that land "inundated or saturated by surface or ground water" has any connection to interstate commerce and effectively render the Commerce Clause meaningless.

## **II. THE CORPS' REGULATIONS RESULT IN A TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.**

### **A. Regulation which denies a property owner of viable, beneficial use of his land constitutes a taking under the Fifth Amendment.**

The Clean Water Act has been moulded by the executive branch into regulations containing a permitting process typical of zoning and land use regulation available only to the states under their general police power jurisdiction. *See, Village of Belle Terre v. Boraus*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The permitting policies of the Corps have evolved into an extensive public interest review process, considering such factors as:

"... conservation, economics, aesthetics, general environmental concerns, historic values, flood damage protection, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people". [33 C.F.R. 320.4(a)(1)]

When these regulations are coupled with the Corps' expanded definition of wetlands as land "inundated or saturated by surface or ground water", 33 C.F.R. 323.2 (b) (2), the Corps' implementation of its Section 404 program results in a policy of extensive federal land use regulation that does not consider as significant the protected interest of the property owner.

This pervasive regulatory structure, purportedly authorized under the Commerce Clause, raises serious "tak-

ing" concerns under the Fifth Amendment of the Constitution of the United States. As the Sixth Circuit observed, "A very real taking problem [is raised] with the exercise of such apparently unbounded jurisdiction by the Corps" (Pet. App. 15a). This observation was underscored by the United States Claims Court in its recent decision in *Florida Rock Industries, Inc. v. United States*, No. 266-82L (U.S. Claims Court, filed May 6, 1985). In that case, the Claims Court held that denial of a Section 404 permit to a company wishing to mine phosphate constituted a Fifth Amendment taking for which compensation was due. After noting that the federal government has a program to preserve wetlands deemed ecologically important by compensating the property owner,<sup>8</sup> to conserve wetlands, the Claims Court evaluated the Fifth Amendment "taking" issue by noting:

The difficulty arises because the property in question does not belong to the public but to the plaintiff. It may be perfectly appropriate to consider only the public interest factors when determining the use of public land. However, when government treats private land as if it were its own, ignoring the interests of the property owner and rendering the property economically useless, it has worked a taking and, under our constitution, compensation is due." [*Florida Rock*, slip op. at 24.]

The Claims Court's analysis in *Florida Rock*, is fully compatible with this Court's decision in *Chicago R.I. & P.R. Co. v. United States*, 284 U.S. 80 (1931), in which this Court ruled that "confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title." 284 U.S. at 96. This Court has long held to the principle that "if regulation goes too far it will be recognized as a taking".

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<sup>8</sup> "Most interestingly though, is the Water Bank Act. Under this Act, Congress recognized that it is in the public interest to preserve, restore and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources. 16 U.S.C. § 1301 (1982)". [*Florida Rock*, slip op. at 22].

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Accord, Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). In *Kaiser Aetna v. United States*, 444 U.S. 154 (1979) this Court reiterated this principle in holding that the exercise of federal regulatory authority to require the owners of a private marina to allow free public access would have amounted to a taking for which compensation would be due. 444 U.S. at 345.

Riverside finds itself in precisely the same situation as the plaintiff in *Florida Rock, supra*, as the Corps' assertion of Section 404 jurisdiction over its property and denial of a Section 404 permit effectively forces it to preserve its property in a natural state. The Claims Court specifically noted that any construction connected with alternative uses of the land at issue would require a Section 404 permit and made a finding of fact that "it is unthinkable that the Corps would issue such a permit in light of its denial of plaintiff's application." *Florida Rock*, slip op. at 4 (footnote omitted). It specifically held that "denial of the [Section 404] permit therefore has deprived plaintiff of all economically viable use of its land." *Id.*, slip op. at 5.

The Sixth Circuit's recognition of a "very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps" was well founded and fully consistent with settled Fifth Amendment analysis. *Ruckelshaus v. Monsanto Co.*, No. 83-196, 81 L.Ed. 2d 815, 833-834 (June 26, 1984) (Government action short of acquisition of title or occupancy can work a taking if its effect is to deprive the owner of all or most of his interest in the subject matter); *San Diego Gas v. City of San Diego*, 450 U.S. 621, 651 (1981) (Dissenting opinion by Justices Brennan, Stewart, Marshall and Powell) ("taking" may occur without a formal condemnation proceeding or transfer of fee simple); *Agins*, 447 U.S. at 262 (1980) (Fifth Amendment taking occurs when gov-

ernmental regulation "denies an owner economically viable use of his lands").

*Amicus curiae* contend that the federal regulatory agencies have utilized the Section 404 program as a federal land use mechanism in violation of the Fifth Amendment requirement of just compensation for governmental taking of private property.

**B. Application of the Corps' regulations results in an unconstitutional Fifth Amendment taking of private property.**

The Sixth Circuit addressed a major concern of the Citizens of Chincoteague in recognizing that the interjection of federal jurisdiction into the backyards of every citizen may result in an unconstitutional "taking" of property. Nowhere is this concern better appreciated and understood than on the Island of Chincoteague which includes many low-lying damp areas that might be considered "wetlands" under the Corps' far reaching definition.

The Government and the NWF state that wetlands of the United States and wetlands of the States will be lost if this Court does not reverse the decision in this case. (Pet. Brief at 40 and NWF Brief at 19) They assert that reversal will permit the preservation of these vast wetlands areas. If the permitting process is, as they assert, merely a permitting process and not a regulatory taking, how will their objective of preservation of these wetlands result? The answer is found in the regulations of the Corps where, once jurisdiction is established, a property owner is no longer free to put his property to any economically viable or beneficial use that he may choose. At that point, all choice of use is transferred to the Corps and as will be discussed, the Corps is predisposed under the regulations towards not allowing any reasonable use of property that it determines is a wetlands.

The Government argues that a taking of private property does not arise from the mere assertion of regulatory

authority to require an application for a permit. (Pet. Brief at 30-32). In this case, however, the Corps' permitting system is designed to preclude alternative, beneficial uses to property owners of land "administratively defined" as wetlands. Instead, the permitting process of the Corps is designed to deny permit requests or to grant permits only under very limited circumstances, thereby making the total use restrictions imposed at the onset of the Corps' jurisdiction permanent.

The Government has asserted in its brief that a Corps permit will be issued if the proposed activity complies with the guidelines issued under 404(b) of the Act, 33 U.S.C. 1344(b), and is otherwise not contrary to the public interest. (Pet. Brief at 40). The problem with the Government's proposition is that the Corps' regulations predetermine that the filling of wetlands is not in the public interest. The Corps' regulations direct that "[n]o permit will be granted unless its issuance is found to be in the public interest." 33 C.F.R. 320.4(a). The section immediately following states in turn, that "[w]etlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 C.F.R. 320.4(b) (Emphasis added). This regulatory predetermination that the filling of wetlands is not in the public interest raises an insurmountable barrier for a property owner to overcome in attempting to obtain a fill permit. If it is not in the public interest to fill wetlands and a citizen files a permit application to fill wetlands, then the permit must be denied because it is not in the public interest.

In an attempt to avoid this conclusion, the Government argues that it is only fill proposals requiring an unnecessary alteration of wetlands that the permitting program is designed to prohibit. (Pet. Brief at 11, 42) The fallacy of the Government's argument lies in the Corps' regulations, which set forth criteria to be used in determining what projects constitute a necessary filling. Under this criteria no realistic proposals can qualify for

a permit. The relevant Corps' regulations, 33 C.F.R. 320.4(b)(4), and those of the EPA, 40 C.F.R. 230.10 (a)(3) address what the Corps considers to be a *necessary* alteration.<sup>9</sup> These sections provide that no permit will be granted unless two requirements are met: the proposed use must be water dependent; and there can be no other practicable alternative sites available.

The requirement of water dependency may be reasonable in the case of a project proposal for a frequently inundated wetland, as a frequently inundated wetland is connected to a waterbody. However, this requirement is totally unreasonable when applied to a non-inundated wetland like Riverside's property because the non-inundated wetland is not connected to a waterbody. Logic dictates that a water dependent project would not be located on a site that is not connected to a waterbody. The only realistic project proposal for a non-inundated wetland would be one that was not water dependent which, in accordance with the Corps' and EPA's regulations, has already been predetermined to be an unnecessary alteration of a wetland and therefore, not in the public interest.

The second requirement under 33 C.F.R. 320(b)(4) and 40 C.F.R. 230.10(a) that there be no alternative site

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<sup>9</sup> 33 C.F.R. 320(b)(4) states:

No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a) above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. *In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available.* (Emphasis added).

EPA's regulation 40 C.F.R. 230.10(a)(3) has a similar requirement: no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. The current regulations of both agencies are substantially unchanged versions of the 1977 regulations.

available for the proposed use is equally unreasonable. The Government acknowledges that the regulations presume that there are alternative sites for *all* proposed uses, with the property owner having the burden of overcoming this presumption. (Pet. Brief at 41). *Amicus curiae* submits that there are very few, if any, non-water dependent projects where there are no practicable alternative sites available for the proposed use. As such, the presumption imposed by the Corps and EPA regulations is impossible to overcome. This impossibility, coupled with the unreasonable requirement of water dependency, has the effect of preventing any realistic economic or beneficial use of property such as Riverside's.

In summary, the Corps' establishment of jurisdiction over private property effectively removes one of the fundamental constitutionally protected rights of ownership, the right of the property owner to put his land to some economically viable or beneficial use. The permitting process, being heavily biased against granting a permit for any realistic economic or beneficial use, does nothing to cure the regulatory taking that results from the total restrictions on *all* uses that are imposed at the onset of the Corps' jurisdiction over the property of a citizen.

### **III. THE FEAR THAT THE SIXTH CIRCUIT EXPRESSED CONCERNING THE POTENTIAL FOR TAKING BY INTERJECTION OF THE CORPS' JURISDICTION INTO THE BACKYARDS OF EVERY CITIZEN IS WELL FOUNDED.**

There are an infinite number of sites throughout this country, including many on Chincoteague, that have low lying damp areas which could qualify as "wetlands" under the Corps' extremely broad definition. The following are just a few examples of the types of "takings" effectuated by the Corps under the Section 404 permit requirements upon some of our citizens.

1. Mr. and Mrs. Lawrence Ransley purchased Lot 23, located in the Pinedale-Rosedale Subdivision of Chincoteague to build their home. This subdivision contains

31 lots and is bounded by Ridge Road and Division Street. Lot 23 is also bounded by Pinedale Drive and Rosedale Drive. Mr. and Mrs. Ransley's inland property is located in an upland area of Chincoteague not in the vicinity of any waters of the United States. It includes a low area 30 feet wide by 100 feet long which, because of poor drainage supports cattails and other wetland vegetation. In order to build their home, it was necessary for the Ransleys to fill this area. They were advised by the Corps that a permit was required. They applied to all state and local wetlands agencies and were advised that a permit was not necessary. The Corps processed their application and on January 24, 1985, denied their permit request claiming it was necessary "based on a public interest review, to deny the project as proposed due to the lack of a justifiable need to destroy valuable wetlands." As a result, Mr. and Mrs. Ransley have been barred from building their house on Lot 23.

2. In 1969, three years before the FWPCA was enacted, Richard and Carolyn Conklin purchased upland property located in a developed residential area near the center of Chincoteague. They began constructing a row of townhouses on the property in early 1982. On September 9, 1983 they received a Formal Cease and Desist Order from the Corps advising them that they had filled wetlands within their regulatory jurisdiction. The order gave them fifteen days to remove the fill. The cease and desist order pertained to an approximately 100 x 100 foot area which can be described as a sink hole with a lower topography that contained trash and other debris. The Corps described the area as a wetland relatively small in size, isolated by surrounding upland and cut off from any inundation. The Corps admitted that even without any filling by the Conklins, the wetland vegetation probably would have decreased in time due to its isolation.

Upon receiving the cease and desist order, the Conklins agreed to submit an After-the-Fact Application for au-

thorization to fill and also agreed to the Corps' demands for mitigation. Mitigation as practiced by the Corps and its consulting environmental agencies requires that a property owner requesting a permit bulldoze uplands and make them into wetlands as the price for receiving a permit.

Mitigation in this case required the purchase of two parcels of property totalling more than 10,000 square feet, clearing off all trees and other upland vegetation, lowering the elevation of the land to a point which would allow tidal waters to flood the land and then planting and fertilizing 8,999 spartina alternaflora sprigs and 361 Iva frutescens plants, thereby creating two man-made bogs out of what was before high and dry land.

3. Terry and Debra Combs, Jay and Barbara Mason, Teri and Dana Gorner, George and Linda Hall, James and Nancy Adams, William and Patricia Jones, Richard and Rosemary Merrill, David and Elaine Fioriglio, Kruso Flipic, James Jester, Earl Ross and Charles Snear all owned property in a residential subdivision known as the Ridge Road Development located in Chincoteague. More than a year after these lots were purchased and after four homes had been constructed, the Corps and the EPA brought suit in the United States District Court for the Eastern District of Virginia against each of these individuals, along with the developer of the Ridge Road Development, alleging that the property to which they held title was once a wetland under the Corps' jurisdiction and that the developer had filled this property without a Corps permit. The government sought a Court order to restore the development to its former condition notwithstanding that the property had been purchased more than a year earlier and homes had been constructed on four of the twelve lots.

After a year of costly legal proceedings the suit was dismissed due to lack of evidence. The cumulative legal expenses of the property owners exceeded \$30,000.00 and during the year of litigation they were unable to sell, develop or make any improvements on their land.

4. Mr. Delmas Mears owns a lot located on Chincoteague on which he operates an auto repair business. On November 18, 1983 he received a notice from the Corps advising him that aerial photographs revealed that a wetland which was once located in his backyard in 1977 had been filled without a permit and that he had thirty days to either remove the fill or apply for an After-the-Fact Permit. This area contained approximately .65 acres covered with grass. The Corps claimed that it was at one time a cattail patch. The Corps also gave the same notice of violation to Mr. Mears' next door neighbors, Mr. Williams and Mr. Hall.

Mr. Mears freely admitted that he had added sand over the years since 1968 to a low area in his backyard which previously was a breeding ground for rats and mosquitoes. But, he denied that this property was ever a "wetland".

Mr. Williams and Mr. Hall were not required to remove the fill from their properties after agreeing to pay \$500.00 and signing a Consent Order. Mr. Mears, not wanting to pay \$500.00, applied for an After-the-Fact Permit.

On reviewing Mr. Mears' application, the Corps noted that most of his property was uplands and that there had been considerable "legal filling" done all around his property. Nevertheless, on May 24, 1985, the Corps denied Mr. Mears' permit, finding:

[T]he completed project to be contrary to the public interest because of the unnecessary loss of freshwater wetlands and because of the potential for cumulative environmental degradation.

The Corps, acknowledging that it would be of little or no benefit to the environment in the area to require Mr. Mears to remove the fill, instead put him on notice of their intent to refer the matter to the Justice Department for an appropriate civil penalty. As of this date, Mr. Mears is awaiting further Government action.

5. The following case occurred in nearby Chesapeake, Virginia. 1902 Atlantic Ltd. applied for a permit on

April 22, 1981 to fill a man-made borrow pit upon which it planned to build an industrial complex. The borrow pit was created by three man-made embankments with a small ditch cutting across the center that allowed tide water into the pit. The Corps denied the permit stating that the proposed project was not "water dependent" as required by 40 C.F.R. 230.10(a)(3). 1902 brought suit claiming that the denial of the permit was arbitrary and capricious and that the Corps' action was an unconstitutional regulatory taking. The Court agreed, stating that the Corps' actions not only resulted in a diminution in value of the property, but also denied 1902 all viable economic use of their property. The Court also held the permit denial was arbitrary, capricious and an abuse of discretion and the Corps was ordered to reconsider the permit without imposing the unlawful requirements which exist. *1902 Atlantic Limited v. Hudson*, 574 F.Supp. 1381 (E.D. Va. 1983).

As of this date, 1902 still does not have a permit, and it appears that the Corps has no intention of complying with the District Court's original Order. In the District Court's most recent Order, Judge Doumar stated:

On September 28, 1983 this Court ordered the Corps to either reconsider the plaintiff's permit application in accordance with the views expressed in its opinion or to commence condemnation proceedings. The Corps chose to do neither. Instead, the Corps effectively considered the application de novo and paid no attention whatsoever to the Court's findings of the fact and conclusions of law. Except for referring to the subsequent administrative proceeding as a rehearing, the Corps completely ignored this Court's order. *The Corps obviously believes that it can totally ignore its prior hearings and reports. The Court specifically finds that the Corps' Report was designed to justify a predetermined result—to deny plaintiff's permit application.* Accordingly, this Court has no choice but to order the current District Engineer, Charles D. Boyd, III, to comply with this Court's order of September 28, 1983 and to recon-

sider its decision in the light of that hearing, *not as an adversary but as a fair and impartial determination.* [1902 Atlantic Ltd. v. Boyd, No. 82-533-N, slip. op. at 15, filed Feb. 8, 1985 (Emphasis added)]

Judge Doumar's statement sums up the experiences on the Citizens of Chincoteague with the Corps' implementation of the Clean Water Act. Where it is already predetermined by the Corps' regulations that any alterations to private property are not in the public interest, and where the permitting process in effect allows no permits for the filling of non-inundated wetland areas, any professed fair decision making on the part of the Corps can only be viewed as a sham, heavily biased against the property owner. As such, the total restrictions that the Section 404 permitting process imposes effect an unconstitutional regulatory taking.

#### **IV. THE GOVERNMENT AND ITS SUPPORTING AMICI PAINT THE ENVIRONMENTAL VALUES OF WETLANDS WITH TOO BROAD A BRUSH.**

All areas, wetlands and non-wetlands alike, contribute in one way or another to the overall environment. However, the substantial wetlands values claimed by the Government (Pet. Brief at 14, 39), and NWF (NWF Brief at 11, 18, 19) do not exist in all wetlands. To infer to this Court that all wetlands have the same high productivity as alleged in the Petitioner's briefs is misleading. As noted in a Congressional report, "the intrinsic values and ecological service provided by wetlands can vary significantly from one wetland to another and from one region of the country to another", Office of Technology Assessment, *Wetlands: Their Use and Regulations* 37 (1984) (hereinafter "Wetlands").

Wetlands periodically inundated contribute to some degree in the maintenance of the chemical, physical and biological integrity of the nation's waters as alleged. Some of these wetlands act as a filtering system which prevent sediment from runoffs and tributaries from directly entering, polluting and clogging the water bodies which they border. The vegetation in these periodically in-

undated wetlands can act as a breeding ground for fish and wildlife, and because these wetlands are periodically flushed with the waters that they border, detrital export (the transport of decaying organic matter) can occur.

However, the Sixth Circuit's ruling has no impact on the regulation of *periodically inundated* wetlands in the United States. To the contrary, the Sixth Circuit's opinion held that periodically inundated wetlands were subject to regulation under the Clean Water Act. Significantly, the developmental pressures upon these types of wetlands are considerably less because of their location and characteristics. These wetlands exhibit poor soils which are not suitable for foundations and lack percolation necessary for septic tanks and drain fields. In order to raise the elevation sufficiently to avoid the dangers of flooding requires extensive earth moving, which cannot usually be accomplished with conventional machinery. The resulting cost of development of these wetlands can be expected to exceed the economic value of the ground after development, thereby eliminating development pressures. Accordingly, nature has built in a certain degree of protection for its most productive wetlands.

Contrary to the Government's statement that all "wetlands perform the same important function" (Pet. Brief 14), not all wetlands perform important functions and in fact some may constitute a nuisance and a threat to public health. *Wetlands* 37-38. For example, one function which non-inundated wetlands do not perform is detrital export. In a wetland not subject to periodic inundation from adjoining waterbodies, such as those on Riverside's land, detrital export does not take place because of the land barriers which surround the wetland. Also, not all wetlands purify water through hydraulic conductivity. Some forms of wetlands have sapric subsoils which are sticky, plastic and impervious to water. A. Ash et al, *Natural and Modified Pocosins: Literature Syntheses and Management Options*, 10 (1983) (hereinafter "*Natural Pocosins*"). Wetlands with sapric soils tend to retain water instead of permitting percolation

into the soil. The only way water can leave this type of wetland is overland. C. Richardson, *Pocosin Wetlands* (1981). One result is that chemicals, insecticides and other pollutants which wash into these pools tend to collect and become concentrated until a heavy rain washes them into nearby waterbodies causing environmental damage. *Natural Pocosins* 52. Water in wetlands with sticky soil conditions can also become stagnant or in some cases highly acidic, precluding the presence of fish and wildlife. *Id.* at 16.

One life form which thrives under such conditions is the mosquito. W. King, *A Handbook of the Mosquitoes of the Southeastern United States* (1960). Wetlands which are not periodically inundated by adjacent waterbodies provide a natural breeding ground for the mosquito. *Ibid.* Where there is frequent inundation from adjacent waterbodies, fish that feed on the larvae can enter and survive. Also, the frequent inundation tends to flush the larvae out into open waters where they provide food for non-wetland life forms. *Ibid.* Non-frequently inundated wetlands are not subject to the flushing process and many will not support fish. Therefore, the larvae has a much better chance of surviving.

Mosquitoes take a costly toll on the surrounding populations. They spread disease such as malaria and encephalitis, to name a few, along with causing discomfort and lowered productivity to both man and beast. They effect local economies by discouraging the settlement of new homes and business. They also discourage tourism, the industry upon which Chincoteague depends. The most effective method of controlling mosquitoes in the past has been by draining and filling these still water wetlands where they breed. Communicable Disease Control, U.S. Department of Health, Education and Welfare; *Mosquitoes of Public Health Importance and Their Control* (1962). If the Sixth Circuit's holding is not affirmed, mosquito control which is now under state and local control will become increasingly more difficult and costly. New ditching and land filling will be eliminated

and it will be necessary to obtain a Section 404 permit to maintain ditches that were dug at substantial expense under prior Federal and State programs. Considering that thousands of localities must expend tax revenue upon mosquito control, the cost of the economy as a whole is substantial.

Accordingly, while it may be conceded that the inundated wetlands, such as the wetlands that the Sixth Circuit's decision would protect, do perform some of the beneficial functions that the Government alleges, the same cannot be said for all non-inundated wetlands that the Government now seeks to expand its jurisdiction over. In fact, some of these wetlands possess negative qualities which outweigh any contributions which they might make to the chemical, physical and biological integrity of the nation's waters.

#### **CONCLUSION**

For these reasons and those stated in the Brief of Respondent Bayview Homes, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

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October Term, 1984

UNITED STATES OF AMERICA,

*Petitioner,*

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RIVERSIDE BAYVIEW HOMES, INC., ET AL.,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for  
the Sixth Circuit*

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**BRIEF OF AMICUS CURIAE MID-ATLANTIC DEVELOPERS  
ASSOCIATION IN SUPPORT OF RESPONDENTS**

---

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**QUESTION PRESENTED**

Whether federal jurisdiction to regulate discharges into "navigable waters" under the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 et seq., extends to lands that merely have saturated soils and that exhibit a prevalence of vegetation typically adapted for life in such soils.

In The

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UNITED STATES OF AMERICA,

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**BRIEF OF AMICUS CURIAE MID-ATLANTIC DEVELOPERS  
ASSOCIATION IN SUPPORT OF RESPONDENTS**

---

**INTERESTS OF AMICUS CURIAE**

Pursuant to Supreme Court Rule 36.2, the Mid-Atlantic Developers Association files this brief as *amicus curiae* in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the clerk.

The Mid-Atlantic Developers Association is a consortium of commercial developers in New Jersey and Pennsylvania. Its members have engaged in construction throughout the area, an

area dominated by large sections of wetlands. Because of this, the Association members must frequently apply for permits issued by the U.S. Army Corps of Engineers for the disposal of dredge or fill material into wetlands. They have therefore experienced firsthand the type of problems encountered by Riverside Bayview Homes in the instant case. The Association's members have endeavored to pursue a responsible course of development which will simultaneously lead to the economic prosperity of the region and the protection of valuable natural resources.

### **SUMMARY OF ARGUMENT**

The jurisdiction of the Army Corps of Engineers over inland wetlands with no direct connection to any navigable water is in doubt due to the Sixth Circuit's decision. This decision however, contrary to the position taken by petitioner, does not sound a death knell for protection of these wetlands. The individual states, through the exercise of their police power, are not only capable of administering wetlands programs, they are better equipped to do so than the federal government.

Regulation of the use of land within a state's own borders has traditionally been held to be a matter of primarily local concern. Yet the Corps of Engineers has ignored legitimate state interests in its 404 program. The social costs of engrafting a national solution onto a local problem have been staggering. Local communities have suffered whether development is allowed or rejected when the decision is made contrary to the community's wishes. For the developer, the innumerable delays besetting the 404 program have resulted in lost revenues and opportunities.

Notwithstanding the claims of the petitioners, a number of states have enacted programs which do an admirable job of protecting inland wetlands. An examination of a few representative state programs shows their obvious superiority to the federal plan.

States have avoided the problems experienced by the Corps by providing for landowner notification of a possible wetlands problem, by refining the definition of wetlands and by establishing a clear procedure to deal with the taking issue.

The Corps has even had difficulty in interpreting its own regulations. Decisions on jurisdiction around the country show a marked inconsistency both locally and nationwide. The Corps has been criticized publicly for being too lax in enforcement and at the same time for exceeding the scope of congressional delegation. Both criticisms are valid as there is no definable standard that the Corps has consistently followed. Because of this, the Sixth Circuit properly declined to give deference to the Corps' assertion of jurisdiction over Riverside's property.

The conclusion to be drawn from these legal and factual arguments is that no harm to the nation's wetlands will result from the Sixth Circuit's decision. The individual states will protect the wetlands within their own borders from destruction and will, in fact, do so more efficiently and more wisely than the federal government.

### **ARGUMENT**

#### **I.**

#### **THE REGULATION OF FRESHWATER WETLANDS IS AN APPROPRIATE FUNCTION OF THE INDIVIDUAL STATES.**

The briefs submitted on behalf of the petitioner draw a picture of intense federal interest in preserving and protecting wetlands. This scenario is incomplete, however, without an examination of the significant state interests in this same matter. This case involves the Corps' jurisdiction over interior wetlands, wetlands with no

direct connection to any body of navigable water. The greater part of wetlands of this sort lie wholly within intrastate boundaries in an area where the states' interests are paramount. Despite this, the federal government through the Army Corps of Engineers has seen fit to ignore the traditional state interest in lands within that state's own borders.

This is in contravention to the express mandate of Congress as reflected in the Clean Water Act of 1972, as amended in 1977, 33 U.S.C. § 1251(b) (CWA). This section entitled "Congressional declaration of goals and policy" provides in relevant part:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the administrator in the exercise of his authority under this chapter.

In interpreting this section of the CWA, both state and federal courts have held that Congress intended to give the primary responsibility for control of water pollution to the states. *District of Columbia v. Schramm*, 631 F. 2d 854 (D.C. Cir. 1980); *Mississippi Commission on Natural Resources v. Costle*, 625 F. 2d 1269 (5th Cir. 1980) and *People v. Ludlow*, 75 Misc. 2d 556, 348 N.Y.S. 2d 20 (App. Term 2nd Dept. 1972).

When Congress invites significant state involvement in a given area, federal regulations in that same field should, to the maximum extent possible, be consistent with state objectives. *Cape May Greene, Inc. v. Warren*, 698 F. 2d 179 (3rd Cir. 1983). In that case, involving the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*, the Third Circuit held that when a federal

statutory scheme encourages, though does not direct state involvement, the intent of Congress is deemed to be consistency with the state's determination, whatever that might be. 698 F. 2d at 191.

In the context of the present case, Congress did indeed encourage state participation in wetlands management through the CWA. This theme runs consistently throughout the Act. For example, 33 U.S.C. § 1253 directs the Administrator to encourage uniform state laws. Even 33 U.S.C. § 1344(g)-(k), part of the very section under review, allows the states to assume the Corp's permit program when navigable waters are not involved. Finally, 33 U.S.C. § 1344(t) recognizes the ultimate authority of the state to control the discharge of fill into navigable waters within its own jurisdiction and directs federal agencies to comply with state requirements.

These sections and others, taken together, evince a congressional recognition that the states not only have a legitimate interest in regulating wetlands within their borders, they are well equipped to do so. In fact, the individual states are better equipped to deal with these matters than the federal government.

At the outset, it is important to recognize that land use is primarily a local concern. This Court has said so in quite explicit terms. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Kidd v. Pearson*, 128 U.S. 1 (1888). This long standing maxim is of special validity in the context of the present case, the issue before the Court being the regulation of interior wetlands having no direct connection to navigable waters. State and local agencies are quite obviously more closely attuned to the needs and concerns of the individual communities most closely affected by regulation of these local wetlands.

It is the local communities which must bear the brunt of a Corps wetlands decision. The local communities are the ones who will bear the cost of combatting the diseases associated with the often stagnant marshes and bogs which frequently constitute inland wetlands not inundated by navigable waters. Such wetlands are breeding grounds for mosquitoes which spread a plethora of diseases creating a burden on local health care. In addition, communities suffer a loss of ratables when the Corps refuses to allow local development, ratables a community might need to support its infrastructure.

Conversely, communities may be adversely affected when the Corps decides to grant a permit without giving full consideration to local concerns. Such a decision puts pressure on communities to give the local approvals required in the face of a federal sanction of development. An unwanted development could put a severe strain on a community's schools, its sewer system and its roads. These are all factors best dealt with on a smaller scale, not by a federal agency attempting to apply a national standard on a local level. This is especially true in the context of an agency criticized by Congress for its unwillingness to resolve local concerns. Office of Technology Assessment, *Wetlands: Their Use and Regulation*, 151 (1984) (hereinafter OTA Report).

There are also procedural advantages to state and local administration of wetlands resources. As an agency of the federal government, the Corps is subject to certain constitutional restraints. Regulation of interior wetlands is ostensibly authorized by 33 CFR 323.2(3). As a prerequisite to Corps' jurisdiction, this regulation mandates a showing that the use, degradation or destruction of the wetlands would affect interstate commerce. A commerce clause nexus must be proved to support Corps' jurisdiction.

The states, on the other hand, derive their authority over wetlands from the police power. The police power has been called

the least limitable of the powers of government. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1945); *McDonald v. Mabee*, 243 U.S. 90 (1916). It is said to be the source from which springs the security of the social order. *Pearsall v. Great N.R. Co.*, 161, U.S. 646 (1895). The maxim underlying the police power is "*salus populi suprema lex est*" (the welfare of the people is the highest law). *St. Louis & S.F.R. Co. v. Matthews*, 165 U.S. 1 (1896). It thus follows that wetlands which serve an important ecological function will per se support police power jurisdiction. This obviates the need for proof of an interstate nexus and simplifies administration of the wetlands program.

The police power has indeed been held to support state wetlands programs. *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Comm.*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Cal. Ct. App. 1970); *Potomac Sand and Gravel Co. v. Governor of Maryland*, 266 Md. 358, 293 A. 2d 241, cert denied, 409 U.S. 1040 (1972) and *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E. 2d 666 (Mass. 1965). These determinations are made easier by the presumption of validity which attaches to any exercise of the police power. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

Operating a wetlands program on a national scale also results in procedural inefficiencies extracting a significant toll on the public at large. The cost of paperwork alone was estimated in 1980 to be 17.3 million dollars. *OTA Report* at 154. The most visible cost, however, is the delay. A study by the Office of Management and Budget concluded that the Corps permit program has been "plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public." *OTA Report* at 156. The scope of this problem is evidenced by the 815 days it takes to process a permit application when an Environmental Impact Statement (EIS) is required. *OTA Report* at 157. While the number of projects requiring an EIS is admittedly small, the

ruinous effect on these businesses of such a protracted delay cannot be ignored. The total monetary cost of permit processing delays has been estimated by OMB at 1.5 billion dollars. *OTA Report* at 159. These figures must be evaluated in light of 33 U.S.C. § 1251(f) which establishes a national policy for the minimization of paperwork and the elimination of delays.

In short, the scope of the police power and the improved efficiency of administration, support the idea that the individual states, not the federal government, are best equipped to deal with the regulation of interior wetlands. Congress recognized this and for this reason intended the Corps to exercise its jurisdictional authority in conformity with state interests.

## II.

### **STATE WETLANDS PROGRAMS CURRENTLY IN EXISTENCE AFFORD FULL AND ADEQUATE PROTECTION FOR INTERIOR WETLANDS.**

The point is raised in the various briefs submitted on behalf of the petitioner that the Army Corps of Engineers 404 program offers the only effective protection for interior wetlands. While these briefs admit that some states have programs for the protection of coastal wetlands, they argue that interior wetlands survive only through the intercession of the federal government. This argument, however, is based on a serious misconception of the states' role in wetlands preservation. A number of states have specific programs which protect the very type of wetlands which form the basis of the instant case. An examination of but a few representative state programs shows clearly the error of the petitioner's argument.

One state which has enacted a comprehensive wetlands act is Michigan, the site of the Riverside Bayview Homes Property.

This enactment, effective October 1, 1980 is entitled the Goemaere-Anderson Wetland Protection Act and is codified at MCLA 281.701 *et seq.* Like the Corps of Engineers' 404 program, this act prohibits the placing of fill material in a wetland without first obtaining a permit. MCLA 281.705. Unlike the Corps' program, however, the Michigan Act is specifically made applicable to inland wetlands. MCLA 281.702(g)(ii) and (iii). The Michigan Legislature has also seen fit to make specific legislative findings of the value of wetlands. MCLA 281.703. These findings are remarkably similar to the positions taken by the environmental groups submitting briefs in this case. They recognize the value of wetlands for flood and storm control, wildlife habitat, protection of subsurface water resources, pollution treatment, erosion control, etc. The attitude of the Michigan Legislature is clear. Even in the absence of Corps' regulation, Michigan wetlands would be protected. In fact, under the Michigan Act the department is specifically instructed to consider national concerns. MCLA 281.709(2).

In addition to being more explicit than the federal act, the Michigan statutory scheme is more comprehensive. It addresses several points ignored by the federal act, points which have given rise to uncertainty and litigation with the Corps. Under MCLA 281.720 property owners who are affected by designation of their property as wetlands on a state prepared wetlands map, are so notified in their next property tax bill. This is a vast improvement over the federal system where a property owner's first notice of a wetlands problem may be a cease and desist order from the Corps. See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F. 2d 897 (5th Cir. 1983). In addition MCLA 281.721 provides for the possibility that wetlands regulation may amount to a taking. The federal act has no such provision. This omission has led to a great deal of uncertainty as reflected in the Sixth Circuit's decision in the present case. In fact, there is so much confusion over the taking issue that federal courts are not even sure of the

proper forum in which to bring such a claim. *See 1902 Atlantic Limited v. Hudson*, 574 F. Supp. 1381 (E.D. Va. 1983). Thus, in many ways the Michigan Wetlands Protection Act is superior to the federal scheme.

New York is another state with a stringent wetlands protection act. N.Y. Envtl. Conserv. L. 24-0101 *et seq.* (McKinney 1984) is entitled the "Freshwater Wetlands Act". Freshwater wetlands are defined in Section 24-0107 according to the type of vegetation present. There is no inundation or saturation requirement so the state definition encompasses significantly more land than the federal. Like the Michigan Act, New York requires that notice be given to any affected landowner. Section 24-0301(5). The Freshwater Wetlands Act prohibits the placing of fill in wetlands without a permit and provides for the taking possibility when a permit is denied. Section 24-0705(7). Finally, Section 24-0905 provides for an abatement in the tax assessment of any land subject to use restrictions because of a wetlands determination. Clearly, the New York Freshwater Wetlands Act is a comprehensive and well thought-out program designed to avoid many of the problems inherent in the federal system.

A state with a statutory plan quite familiar to this *amicus* is New Jersey. As a coastal state, New Jersey has a specific enactment for the preservation of coastal wetlands. N.J.S.A. 13:9A-1 *et seq.* This does not mean, however, that inland wetlands are any less protected. New Jersey has two separate statutory schemes for the protection of inland wetlands with a third presently under consideration. The first of these is entitled the Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.*

The New Jersey Pinelands is a vast natural area comprised of 1,082,816 acres in the central and southern parts of the state. Pinelands Commission, *Comprehensive Management Plan for the Pinelands National Reserve* 127 (1980) (hereinafter *Pinelands*

*Plan*). Twenty percent of this area, or more than 200,000 acres, has been officially classified as inland wetlands. *Id.* Like the Michigan and New York statutes, the Pinelands Protection Act is specifically applicable to inland wetlands.

Pursuant to statutory authority, the Pinelands Commission has promulgated administrative regulations to enforce the Act. N.J.A.C. 7:50-6.5, part of these regulations, delineates seven separate categories of land grouped by soil and vegetation which are classified as inland wetlands. The list is not exclusive and it does not contain the inundation or saturation elements which have caused so much trouble in the federal definition.

The protective tone of the Pinelands Act is set by N.J.A.C. 7:50-6.6 which prohibits development of any kind in wetlands located within the Pinelands unless specifically authorized. The only types of developments authorized by the regulations are agriculture and horticulture (N.J. A.C. 7:50-6.8), forestry (N.J. A. C. 7:50-6.9), low intensity recreational uses (N.J.A.C. 7:50-6.11), water dependent recreational facilities (N.J.A.C. 7:50-6.12) and public improvements such as bridges and roads (N.J.A.C. 7:50-6.13). Even these limited uses are allowed only if they do not cause a significant adverse impact, defined in N.J.A.C. 7:50-6.7 to include any change in wetlands vegetation, alteration of the water table, loss of habitat, etc. Moreover, the protections afforded by this act extend to all lands located within 300 feet of any wetland. N.J.A.C. 7:50-6.14. This creates a buffer zone of protection surrounding all wetlands, a significant protective device missing from the federal act.

As these provisions plainly indicate, the Pinelands Protection Act is a significant and effective state program for managing inland wetlands resources. It is a program, in many ways superior to its federal equivalent.

While it is true that the Pinelands Protection Act applies only to the south and central portions of New Jersey, the northern part of the state is not left unprotected. There is a second legislative enactment which applies to wetlands located in that area. This is the Hackensack Meadowland Reclamation and Development Act, N.J.S.A. 13:17-1 *et seq.* Pursuant to this statutory mandate, the Hackensack Meadowland Development Commission (HMDC) is given the authority to adopt a master plan for the area. N.J.S.A. 13:17-6(i). In adopting this master plan which sets the tone for development in the district, the HMDC is commanded to give deference to the legislative declaration of purpose which states in part "that the necessity to consider the ecological factors constituting the environment of the Meadowlands and the need to preserve the delicate balance of nature must be recognized to avoid any artificially imposed development that would adversely affect not only this area but the entire State." N.J.S.A. 13:17-1.

The HMDC has not ignored this legislative intent. It has promulgated a series of regulations which clearly support it.

The starting point for development within the district is N.J.A.C. 19:4-4.11 which prohibits any development in wetlands except in conformance with the HMDC Wetlands Order. Hackensack Meadowlands Development Commission, Master Plan Wetlands Order, adopted (Nov. 8, 1972). The Wetlands Order is a detailed analysis of the wetlands within the Meadowlands district. It provides specific criteria against which all proposed development in the area must be measured. Specifically, the Order requires an extensive assessment of the environmental impact of any development in a wetlands area. This includes frequent soil sampling and testing during the construction phase of the project. Clearly the HMDC's concern is not ended when a permit is granted.

The HMDC has adopted an open space plan for a 6,210 acre open space system consisting of 3,160 acres of wetlands, 1,375

acres of public parks, 1,400 acres of open water, 50 acres for waterway buffer strips and 80 acres of waterfront recreation use. ~~The~~ only development allowed in this system consists of 145 acres for school purposes. N.J.A.C. 19:4-7.2. In addition, there exists a marshland preservation zone in which the only permitted uses are scientific study in regard to marshland ecology and walkways for nature observations. N.J.A.C. 19:4-7.3(b). In fact, there is even a specific prohibition against the use of motor driven vehicles and equipment in this zone. N.J.A.C. 19:4-7.3(d)(2). It is manifestly obvious that the HMDC regulations offer a far more comprehensive plan for wetlands management than the regulations of the Army Corps of Engineers.

Taken together, the Pinelands Protection Act and the Hackensack Meadowlands Reclamation and Development Act encompass the vast majority of inland wetlands in New Jersey. However, recognizing that there may still be some areas left unprotected, Senator Lynch of the New Jersey Legislature has proposed S. 602, '201st Leg. (N.J. 1984) entitled "An Act Concerning The Regulation of Freshwater Wetlands." This Act represents a far more ambitious program for wetlands preservation than any federal plan.

The definition of freshwater wetlands which this Act is meant to regulate is not only broader than the Corps' definition, it is easier to apply. It encompasses the traditional inundation or saturation requirement of 33 C.F.R. 323.2(c). However, it also specifically provides that areas exhibiting these characteristics may be entirely man-induced. Even more significantly, it provides that any area having hydric soils is, by definition, a wetland. This makes it relatively simple to determine whether an area constitutes wetlands simply by taking a soil sample. Under this definition, there could be no doubt that all lands of ecological importance would be classified as wetlands and subsequently protected.

The protection itself is more extensive under the Lynch Bill than under the Corps' regulations. Under the Lynch Bill, in order to obtain a permit to fill a freshwater wetland, a developer must prove that the activity is water dependent, has no feasible alternative site, maintains the natural movement of water in the wetlands and will result in minimum feasible alteration of the natural contour, vegetation, fish and wildlife resources. These requirements are specific enough to allow for ease in enforcement and protective of wetlands to such a degree as to firmly refute any argument that the individual states are incapable of protecting their own wetlands.

New Jersey's legislative measures to protect wetlands have not been in vain. State wetland regulation has consistently found approval in the New Jersey court system. In some cases the courts have gone even farther than the legislature. One such example is *Fine v. Galloway Tp. Committee*, 190 N.J. Super 432 (Law Div. 1983) in which the court held that the Pinelands Protection Act did not prevent an individual municipality within the Pinelands from adopting and enforcing even more restrictive standards of wetlands protection on its own. The court noted that the Pinelands Protection Act is designed to "preserve the continued viability of lands located in the Pinelands region and to protect the unique natural, ecological, agricultural and horticultural resources found in the region." 190 N.J. Super at 444. Therefore, anything designed to advance this goal would be authorized by the Act.

In *Orleans Builders & Developers v. Byrne*, 186 N.J. Super 432 (App. Div. 1982) a New Jersey appeals court upheld the constitutionality of the Pinelands Protection Act as it applied to the regulation of freshwater wetlands. According to the court, the freshwater wetlands areas within the Pinelands "serve significant functions in flood control, in purifying water and in providing a habitat for endangered animals, trees and plants." 186 N.J. Super at 443. Because the Pinelands Act through its

legislative goals recognizes the truth of this principle, the extent of the wetlands degradation was held to be irrelevant. "If exemptions should be granted because development on individual tracts would impair only minutely the entire resources of the Pinelands, the cumulative effect of such exemption would defeat the legislative goals of the Pinelands Protection Act," 186 N.J. Super at 444. Thus, the Pinelands Protection Act is in full force in New Jersey.

Similarly, the constitutionality of the Hackensack Meadowlands Reclamation and Development Act withstood constitutional challenge in *Meadowlands Regional Development Agency v. State*, 63 N.J. 35 (N.J. 1973), *appeal dismissed*, 414 U.S. 991 (1973). Soon after the Act was passed, it was declared that the HMDC had the authority to regulate sanitary landfills within its boundaries. *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission*, 120 N.J. Super. 118 (App. Div. 1972). Sanitary landfills were a serious problem affecting wetlands in northern New Jersey before the HMDC acted to clean them up.

In a different context, the courts have construed state procedural rules to afford maximum protection to wetlands. In *Crema v. New Jersey Department of Environmental Protection*, 192 N.J. Super. 505, (App. Div. 1984), *certif. denied*, 96 N.J. 306 (N.J. 1984) the court held that a party challenging the decision of the Department of Environmental Protection to grant, rather than deny a development permit, need prove merely that the agency's action was erroneous. The usual standard for review of administrative action in New Jersey is the arbitrary and capricious model. Thus, the New Jersey Legislature and courts have acted in concert to preserve the state's wetlands resources.

There is one additional layer of protection for wetlands in New Jersey. The state agencies entrusted with the task of protecting

wetlands have done so diligently. As previously discussed, the Pinelands Commission and the HMDC have promulgated stringent regulations which ensure that wetlands within their respective boundaries will be protected. On a state-wide basis, even before enactment of the Lynch Bill, the New Jersey Department of Environmental Protection has vigorously pursued its own role in wetlands protection. A recent illustration shows clearly the concerns of this agency. Prudential Insurance Company is currently seeking permission to build a large office complex in New Jersey. The complex is to be constructed on 367 acres of freshwater wetlands in Lee Meadows of Parsippany Township. The Army Corps of Engineers provided the developer with all necessary permits in 1982. The DEP, however, objected to the project and so informed the Corps. In 1984, the Corps, under pressure from DEP reversed its former approval. Negotiations are currently underway with Prudential to meet DEP's objection. There could scarcely be better proof that the State of New Jersey is fully protective of its own inlands wetlands and is better equipped to handle the job than the Army Corps of Engineers.

This discussion of the state wetlands programs is not under any circumstances to be considered all inclusive. It is merely representative of states which have enacted specific legislation aimed at protecting what is properly considered to be a state resource. See, e.g., The Coastal and Inland Wetland Restriction Act of Massachusetts, C. 131 Sec. 40A and the Minnesota Water Bank Program, Minn. Stat. Ann. 105.392 *et seq.* both of which afford protection for inland wetlands. The federal government's involvement is at best duplicative and at worst destructive of these legitimate state interests.

### III.

#### THE ARMY CORPS OF ENGINEERS HAS INCONSISTENTLY INTERPRETED ITS OWN REGULATIONS, MAKING JUDICIAL DEFERENCE TO THAT INTERPRETATION INAPPROPRIATE.

The petitioner urges reversal of the Sixth Circuit's decision on the ground that the court failed to give proper deference to the Army Corps of Engineers' interpretation of its own regulations (Pet. Brief at 18). What the petitioner fails to recognize, however, is that such deference is proper only when the agency in question has exhibited a history of consistency in interpretation. When the agency's decisions have been inconsistent, no deference is due. This Court has recognized this fundamental principle on many occasions. *Watt v. Alaska*, 451 U.S. 259 (1981); *S.E.C. v. Sloan*, 436 U.S. 103 (1978); *Morton v. Ruiz*, 415 U.S. 199 (1974) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The common sense of this principle is self-evident, for a court cannot defer to an agency's interpretation of its regulations unless it can be sure what this interpretation really is. Deference to an inconsistent series of agency decisions would give that agency unbridled power to define its jurisdiction without ever incurring the risk of effective judicial review. These principles are especially relevant here for the Army Corps of Engineers' interpretation of its jurisdiction has been widely inconsistent.

The Sixth Circuit decision in the instant case was based on the Corps' extension of its own jurisdiction beyond the parameters Congress had envisioned. During the same general period, however, the Corps has come under attack by environmental groups for its seemingly unwarranted liberality in either granting dredge and fill permits or declining to exercise its jurisdiction at all. One development which received a great deal of attention is the Westway Highway Project in New York City. This six billion

dollar proposal would necessitate filling in the equivalent of 240 acres of the Hudson River between 42nd Street and Battery Park. Despite the strenuous and repeated objections of the Environmental Protection Agency, the Fish and Wildlife Service and the National Marine Fisheries Service, the Corps of Engineers granted a dredge and fill permit. The Corps' decision is, at the time of submission of this brief, the subject of a trial before the Honorable Thomas P. Griesa of the United States District Court, Southern District of New York. In an earlier proceeding in 1982 Judge Griesa voided a prior grant of this permit stating that the Corps' decision could "only be explained as resulting from an almost fixed predetermination to grant the Westway landfill permit." *Action for Rational Transit v. West Side Highway*, 536 F. Supp. 1225, 1248 (S.D.N.Y. 1982).

Though Westway involves a coastal wetland, similar examples may be found in inland wetlands cases. Columbia Manor is a housing project located south of the Columbia Turnpike in Florham Park, New Jersey. In order to construct this development, it became necessary to fill 3.5 acres of forested wetlands. The Fish and Wildlife Service reported unauthorized fill activity to the Corps. After examining the site, the Corps decided it did not have jurisdiction over the fill because the wetlands were relatively small isolated pockets that were detached from the larger area of wetlands and because Columbia Road separates these wetlands from the other wetlands. See State College Field Office of Ecological Services, *An Assessment of the Corps of Engineers' Section 404 Permit Program in Northern New Jersey 1980-1984* (August 1984) at 28 (hereinafter *Program Assessment*).

Similarly, Riverside's property in Michigan is ringed on all four sides by paved public streets and fully-developed urban areas. In one instance the Corps exercises its jurisdiction and denies a fill permit while in the other it chooses to ignore the area entirely. Inconsistencies such as this make it impossible to arrive at sound

business judgments whether to purchase land and whether to fill. At the same time, they make deference to the Corps' interpretation inappropriate.

The *Program Assessment* also offers a significant insight into the Corps' decision making process by its examination of an office complex proposed by Bellemead Development Corporation in the Hackensack Meadowlands of New Jersey. As related by this publication, in 1983 Bellemead was alleged to have filled approximately five acres of wetlands in Lyndhurst, New Jersey. The Fish and Wildlife Service reported the unauthorized fill to the Corps. It was subsequently learned that Bellemead had not sought a permit initially because Mr. Dennis Suszkowski, a representative of the New York Corps District had previously told an applicant who filled nearby wetlands that the Corps had no interest in the area. During a telephone conversation with Robin Burr of the Fish and Wildlife Service, John Marazzo, a representative of the Corps, revealed that both he and the U.S. Attorney, Mike Gilberti, were concerned that the Corps now looked arbitrary and capricious. *Program Assessment* at 6.

It is plain to see that the Corps' jurisdictional decisions have been inconsistent not only on a nationwide scale, but within individual districts and even on a local scale. This has even been recognized by a congressional study which concluded in understated fashion, that "there is a great deal of variability in the manner in which the 404 program is implemented among the semi-autonomous districts." *OTA Report* at 176. This conclusion is borne out by a comparison of Corps' decisions throughout the country. This inconsistency is clearly caused by the lack of specificity in the definition of wetlands promulgated by the Corps. There is no national standard for Corps jurisdiction to which this Court can defer. The inconsistent and unpredictable action of the Corps of Engineers is exactly what one might expect when an administrative agency attempts to impose its own standard

on what is primarily a local concern in derogation of the congressional intent to defer to the individual states' sound judgment in these matters affecting their vital local interests. Therefore, deference is inappropriate and this ground for reversal must fail.

### **CONCLUSION**

For the foregoing reasons *amicus* respectfully submits that the decision of the Court of Appeals should be affirmed.

Dated: June 28, 1985

Respectfully submitted,

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IN THE  
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**OCTOBER TERM, 1984**

UNITED STATES OF AMERICA,

*Petitioner,*

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**BRIEF OF AMICUS CURIAE  
AMERICAN PETROLEUM INSTITUTE  
IN SUPPORT OF RESPONDENTS**

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(i)

**QUESTION PRESENTED**

Whether federal jurisdiction to regulate discharges into "navigable waters," under the Federal Water Pollution Control Act, as amended, extends to lands that merely have saturated soils and exhibit a prevalence of vegetation typically adapted for life in such soils.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

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No. 84-701

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**BRIEF OF AMICUS CURIAE  
AMERICAN PETROLEUM INSTITUTE  
IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF AMICUS CURIAE**

Pursuant to Supreme Court Rule 36.2, the American Petroleum Institute files this brief as *amicus curiae* in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the clerk.

The American Petroleum Institute is a national trade association with a membership of approximately 230 corporations and 6,000 individuals. Because our members frequently must apply for permits issued by the U.S. Army Corps of Engineers ("Corps") for the disposal of dredge or fill material into "navigable waters," we and our members have a substantial interest in the issue now under review.

## SUMMARY OF ARGUMENT

The court of appeals properly found the Corps' overly expansive definition of "navigable waters" to be beyond the intent of Congress. At no time did Congress express an intent that "navigable waters" include lands whose soils become saturated by either rainwater or groundwater. To the contrary, Congress knew well what "navigable waters" were when it amended the Federal Water Pollution Control Act ("FWPCA" or the "Act") in 1961 to extend its coverage to "navigable waters" and when it amended the Act again in 1972 to define that term.

The intent of the 92nd Congress in defining "navigable waters" was to make clear that this Court's interpretations of that term, reflected in a long line of opinions defining the spatial limits of Congress' Commerce Clause power over "navigable waters," would be controlling – not administrative determinations which had been made for ease or efficiency. That this was so is made clear by the several statutory provisions concerning the interrelation between the FWPCA and the Refuse Act. Moreover, it was the Refuse Act and its permitting scheme, based upon controlling discharges to "navigable waters" at their source, which served as the model for the creation of the Act's new permitting regimes.

The Corps' 1974 regulatory definition of "navigable waters" under the FWPCA was overly constrained and summarily overturned by the courts. In response, the Corps developed revised definitions in 1975 which, while going incrementally beyond the intent of Congress, extended the Corps' regulatory jurisdiction to wetlands adjacent to "navigable waters" if they were periodically inundated by such waters and if the vegetation there found required periodic inundation to grow and reproduce.

Subsequent amendments have not altered the definition of "navigable waters." Thus, the deliberations of the 92nd Congress remain the best expression of what was intended by the words it used. The 1977 legislative history and the extensive congressional hearings over the Corps' 1975 regulations, however, may indicate that these regulations were legislatively ratified.

The regulatory definition at issue here, promulgated late in the 1977 legislative process, defines "navigable waters" in terms so broad as to be almost unrecognizable when compared with the thoroughly reviewed and considered 1975 rulemakings. Consequently, no credible argument can be made that it, too, was legislatively ratified.

Although the "navigable waters" concept may be broad, it is not so broad as to include all lands that merely have saturated soils and vegetation that tolerates, but does not require, saturated soils. Accordingly, the judgment below should be affirmed.

## ARGUMENT

The question presented is whether federal jurisdiction over "navigable waters" extends beyond true "waters" to include lands that merely have saturated soils and a prevalence of vegetation adapted for life in such soils. Ultimately, the question is whether these lands are "waters of the United States."

The court below took a common sense approach to the problem and held that the term "navigable waters," as defined by the Act, includes all water bodies (e.g., lakes and rivers) and all adjacent wetlands that depend for their existence upon frequent flooding by such water bodies, but no more. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 397-398, 401 (6th Cir. 1984). In so holding, the court rejected the Corps' 1977 definition of "navigable waters," which had placed certain lands under its regulatory control.

The issue here is not whether Congress could regulate activities on these lands,<sup>1</sup> but whether Congress did intend to do so when it defined the term "navigable waters" in 1972. The 1972 Amendments did not emerge out of thin air. Considerable case law and legislative activity had preceded them. Conse-

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<sup>1</sup>For example, we recognize that Congress can regulate a broad array of activities under the Commerce Clause if it first determines that they may have effects in more than one state. See *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

quently, the intent of Congress in defining this term can best be discerned by placing its actions in their historical context.<sup>2</sup> Viewed in this light, its intent becomes clear and that intent supports fully the view expressed by the court below.

### I. Congress Was Fully Aware Of What Were "Navigable Waters" When It Amended The Federal Water Pollution Control Act In 1972.

The 1972 Amendments define "navigable waters" as "the waters of the United States, including the territorial seas."<sup>3</sup> Since that definition has not been altered by subsequent amendments, the legislative history surrounding its adoption constitutes the best expression of congressional intent as to its meaning. The 1972 legislative history reflects well-developed prior law concerning federal jurisdiction over "navigable waters," particularly under the Refuse Act<sup>4</sup> and the Federal Water Pollution Control Act of 1961.<sup>5</sup> It is to these earlier developments that we first turn.

1. In the second half of the 19th Century, Congress repeatedly confronted the problem posed by the discharge of refuse and other materials into the waters of the United States.<sup>6</sup> Its efforts culminated in the passage of the Rivers and Harbors Act of

<sup>2</sup>Such a historically-based approach to discerning the extent to which Congress intended to exercise its constitutional powers is not novel and has often been used by this Court in other settings. See, e.g., *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 400-08 (1975).

<sup>3</sup>P.L. 92-500, §502(7), 91 Stat. 1566 (1972) (codified at 33 U.S.C. §1362(7) (1982)).

<sup>4</sup>The Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1982), commonly known as the "Refuse Act."

<sup>5</sup>P.L. 87-88, 75 Stat. 204 (1961).

<sup>6</sup>See, e.g., River and Harbor Act of 1886, P.L. 49-929, §3, 24 Stat. 329 (1886); New York Harbor Act of 1888, P.L. 50-469, §1, 25 Stat. 209 (1888); River and Harbor Act of 1890, P.L. 51-907, §6, 26 Stat. 453 (1890); River and Harbor Act of 1894, P.L. 53-299, §6, 28 Stat. 363 (1894).

1899. Section 10 of that Act created separate prohibitions against: (1) obstructing "the navigable capacity of any of the waters of the United States"; (2) building any structure in "any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States"; and (3) excavating, filling, or modifying the condition or capacity of "any navigable water of the United States."<sup>7</sup> Section 13 went considerably further and declared it to be unlawful to discharge refuse of any kind or description into any "navigable water of the United States" or into "any tributary of any navigable water."<sup>8</sup>

Between 1899 and 1966, considerable uncertainty existed over whether discharges under the Refuse Act were limited to discharges that have a tendency to affect navigation. This quandary was laid to rest by *United States v. Standard Oil Co.*, 384 U.S. 224, 228-29 (1966), wherein this Court held that "the 'serious injury' to our watercourses . . . sought to be remedied [by the Refuse Act] was caused in part by obstacles to navigation and in part by pollution." See also *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670-72 (1973). Nonetheless, when the Corps revised its regulations in 1968, it continued to define Refuse Act discharges as only those which impede navigation.<sup>9</sup>

<sup>7</sup>33 U.S.C. §403 (1982).

<sup>8</sup>33 U.S.C. §407 (1982). Although the Refuse Act also prohibits the depositing of any refuse on the banks of a navigable water or a tributary thereof, such is prohibited by the terms of that Act only when deposited materials might later impede or obstruct navigation. No such navigation-based limitation appears or applies to discharges directly into navigable waters or their tributaries. See *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 670 n.23 (1973).

<sup>9</sup>The geographic scope of the Rivers and Harbors Act of 1899, including section 13 (the Refuse Act), was then envisioned by the Corps as being limited to "navigable waters," thereby improperly excluding the tributaries of navigable waters from its regulatory control, 33 C.F.R. § 209.200(e)(2) (1969). To make matters worse, the Corps adopted a crabbed definition of "navigable waters," which excluded nonnavigable waters that could be made navigable through reasonable improvements, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-10, 416 (1940), and intrastate waters that serve as a link

The Corps' overly constrained approach under the Refuse Act was swept away by Executive Order No. 11574.<sup>10</sup> The executive order not only included tributaries within Refuse Act jurisdiction, but also omitted any reference to required effects upon navigation, glaring deficiencies under the Corps' earlier regulations. Significantly, this new permit program was based, at least in part, upon the report of the House Committee on Government Operations entitled *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*.<sup>11</sup> Although the President envisioned this new program as providing "a major strengthening of our efforts to clean up our Nation's waters,"<sup>12</sup> its separate existence was cut short just eighteen months later by the passage of the Federal Water Pollution Control Act Amendments of 1972.

2. In 1948, Congress passed the first Federal Water Pollution Control Act.<sup>13</sup> Although largely advisory and consultative in nature, the Act did include a limited, but cumbersome, quasi-enforcement scheme for the abatement of pollution of "interstate waters."<sup>14</sup> Congress simplified the federal enforcement process in 1956<sup>15</sup> and again in 1961.<sup>16</sup> In addition, the 1961

in the chain of commerce among the States, cf. *Utah v. United States*, 403 U.S. 9, 11 (1971) and cases cited therein. 33 C.F.R. § 209.260 (1969).

<sup>10</sup>35 Fed. Reg. 19627 (1970).

<sup>11</sup>H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970). See 117 Cong. Rec. 1754 (1971) (remarks of Rep. Dingell).

<sup>12</sup>Weekly Compilation of Presidential Documents 1724 (Dec. 23, 1970).

<sup>13</sup>P.L. 80-845, 62 Stat. 1155 (1948).

<sup>14</sup>§2, 62 Stat. 1156. The polluting act that would give rise to an abatement action included discharges directly into interstate waters and discharges to the tributaries of such waters, provided that the pollution crossed state lines and endangered the health or welfare of persons in a neighboring state. *Id.*

<sup>15</sup>The Water Pollution Control Act of 1956, P.L. 84-660, §§8, 70 Stat. 498, 504-05 (1956).

<sup>16</sup>The Federal Water Pollution Control Act of 1961, P.L. 87-88, §7, 75 Stat. 204, 207-10 (1961).

Amendments expanded the geographic scope of the Act's abatement/enforcement scheme to include all "navigable waters."<sup>17</sup>

Congress then considered water to be "the No. 1 resource problem confronting the United States" and concluded that a water pollution enforcement scheme limited to interstate waters was wholly inadequate to address this problem.<sup>18</sup> Particularly significant here is the clear recognition of the type of constitutional power Congress was then exercising. For example, the House Report contains an in-depth discussion of the constitutional power of Congress over "navigable waters":

It is well settled that the jurisdiction of Congress over waters capable of use as highways of interstate or foreign commerce, which is derived from the commerce clause of the Constitution, extends as well to intrastate [citations omitted] as to interstate waters [citations omitted]. The power to regulate commerce necessarily embraces all matters pertaining to navigation on such waters but is not limited to navigation . . . Congress and the courts have long assumed that as "public property" of the Nation the quality of navigable waters of the United States is within the protection of Congress. For over 61 years the pollution of navigable waters by refuse has been prohibited by Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. 407) without regard to its effects on navigation.<sup>19</sup>

It is also noteworthy that Congress then recognized that its expansion of the Act to encompass "navigable waters" would

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<sup>17</sup>*Id.* See also H.R. Rep. No. 306, 87th Cong., 1st Sess. 1-3, 8-12, 16-18 (1961); S. Rep. No. 353, 87th Cong., 1st Sess. 2, 91 (1961); 107 Cong. Rec. 7144-47 (1961) (House debate).

<sup>18</sup>H.R. Rep. No. 306, 87th Cong., 1st Sess. 2, 8 (1961). Of an estimated 26,000 water bodies in the United States, only 4,000 were of an interstate nature. *Id.*

<sup>19</sup>H.R. Rep. No. 306, 87th Cong., 1st Sess. 10 (1961).

result in exactly the same waters being covered under the FWPCA as under the Refuse Act.<sup>20</sup>

The issue is brought into even sharper focus when one considers the minority views on the House bill. In opposing an expansion of federal jurisdiction beyond "interstate waters," it was observed that this would "*extend federal enforcement jurisdiction to all waters*" and that "*for all practical purposes the new Federal enforcement provision would apply to all waters in every State.*" (emphasis in original).<sup>21</sup> The dispute continued to the floor, but the committee bill passed and later became the Federal Water Pollution Control Act of 1961.<sup>22</sup> Although the Act was amended several times thereafter, none of these changes affected its scope or shed any additional light on congressional intent until the onset of deliberations in the 92nd Congress.

3. By late 1971, the role of the Refuse Act in preventing industrial pollution had been well defined through the implementation of a Refuse Act permit program under Executive Order No. 11574. Moreover, the FWPCA, as amended, was recognized as having the same geographic coverage as the Refuse Act; each complemented the other. Although both laws were based upon federal jurisdiction over "navigable waters," neither contained a definition of this term. This was not perceived by Congress to be a deficiency because numerous decisions of this Court had defined clearly the geographic limits of "navigable waters."

Early in its history, this Court recognized that the power to regulate commerce under the Commerce Clause, U.S. Constitution, art. 1, §8, cl. 3, necessarily included power over navigation. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). After recognizing the constitutional basis for the exercise of such power, this Court then proceeded to define its spatial limits. In what is sometimes referred to as the classic definition of

<sup>20</sup>See 107 Cong. Rec. 7145 (1961) (statement of Rep. Burdick, one of the bill's floor managers).

<sup>21</sup>H.R. Rep. No. 306, 87th Cong., 1st Sess. 24, 25 (1961).

<sup>22</sup>107 Cong. Rec. 7144-62, 7165-72, 7195 (1961).

"navigable waters," this Court stated that the term included those waters that

form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

*The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). In subsequent cases this definition was broadened to include all waters capable of use for waterborne commerce,<sup>23</sup> all waters with a past history of use by waterborne commerce,<sup>24</sup> all waterways that could be made navigable "with reasonable improvements,"<sup>25</sup> and all waters that serve as a link in the chain of commerce among the states, a chain that can include other modes of commerce as well (e.g., highways or railroads).<sup>26</sup>

These spatial concepts, grounded upon recognized Commerce Clause power over navigation, served to define clearly the scope of the FWPCA and the Refuse Act. Although the geographic scope of these laws was defined by reference to waterborne commerce (i.e., navigability), the incidence of federal power over such waters is not so limited. As expressed in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940):

It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation . . . That authority is as broad as the needs of commerce . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.<sup>27</sup>

<sup>23</sup>*The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874).

<sup>24</sup>*Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-122 (1921).

<sup>25</sup>*United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-10 (1940).

<sup>26</sup>*Utah v. United States*, 403 U.S. 9, 11 (1971).

<sup>27</sup>To this list should be added the power to protect such waters from pollution. *United States v. Standard Oil Co.*, 384 U.S. 224, 229-30 (1966). See also H.R. Rep. No. 306, 87th Cong., 1st Sess. 10 (1961).

Thus, by late 1971 this Court had developed a doctrine of "navigable waters" which defined an expanded, but clearly limited, area in which Congress can exercise its Commerce Clause regulatory powers.

**II. The Extensive Legislative History Surrounding Enactment Of The 1972 Amendments Demonstrates Conclusively That The 92nd Congress Recognized The Differences Among Land, Water And The "Waters Of The United States," Considered The Geographic Reach Of Its Amendments As Being Identical To Then Existing Federal Jurisdiction Under The Refuse Act, And Intended The Term "Navigable Waters" To Apply To The Furthest Extent Of Its Commerce Clause Power As That Power Had Been Applied To Waterborne Commerce By This Court.**

1. The Senate took the lead in advancing amendments to the FWPCA during the 92nd Congress. The bill which emerged from the Committee on Public Works (S. 2770) defined "navigable waters" as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."<sup>28</sup> As explained by the accompanying report:

The control strategy of the act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

<sup>28</sup>S. 2770, 92d Cong., 1st Sess. §502(h) (1971), reprinted in S. Rep. No. 414, 92d Cong., 1st Sess. (1971).

S. Rep. No. 414, 92d Cong. 1st Sess. 77 (1971). Standing alone, this explanation may be less than a model of clarity, but when read in conjunction with section 402(a)(4) of the FWPCA<sup>29</sup> and its accompanying legislative history, the intent of the language becomes clear.

The precursor to section 402(a)(4) contained in S. 2770 was section 402(a)(3) of the committee bill. In explaining this provision, the committee stated:

Section 402 provides statutory basis for the continuation of a Federal program to control, on a source by source basis the discharge of pollutants into the navigable waters.

In addition to redirecting the control program from ambient standards to direct effluent controls, the second most difficult policy and program issue which the Committee considered was the integration of the program under section 13 of the Refuse Act of 1899 initiated by the Administration pursuant to Executive Order in December of 1970.

When implemented and applied to pollution, the Refuse Act permit program established a direct relationship between the Federal Government and each industrial source of discharge into the navigable waters of the United States.

This relationship existed completely independent of the Federal-State program established under the 1965 Act and created a duality of control requirements that placed all parties under a cloud of uncertainty. In addition to the problem of intergovernmental relations, the Refuse Act authority has significant gaps (particularly its exemption of municipal waste treatment

<sup>29</sup>Section 402(a)(4) provides, in pertinent part, that:

All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [the Refuse Act], shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 . . .

33 U.S.C. §1342(a)(4) (1982).

works) that render it seriously inadequate as a means of implementation of a water pollution control program.

S. Rep. No. 414, 92d Cong., 1st Sess. 70 (1971). The report later stated that:

The period of implementation of the Refuse Act permit program coincides with the evolution of the bill reported by the Committee. Consequently, continuous consultation was undertaken with representatives of State governments, and the Administration in an effort to weave the permit program into this legislation. The Refuse Act as now restated in the Committee bill establishes that the discharge of pollutants into the navigable waters of the United States is prohibited. The Federal Government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters and, under the Committee bill, seek to achieve elimination of the discharge of pollutants.

*Id.* at 71.

Although the committee found that "the national effort to abate and control water pollution has been inadequate in every vital respect," *Id.* at 7, nowhere did it suggest that the scope of the term "navigable waters," as used in the Refuse Act and the 1961 Amendments or as interpreted by the courts, was in any way deficient. To the contrary, the committee unquestionably considered the new permit regime to be created by S. 2770 as being nothing more than a simple codification and continuation, with certain procedural changes, of the Refuse Act permit program.<sup>30</sup> Thus, at the time the bill passed, there can be no ques-

<sup>30</sup>To be sure, neither the Refuse Act nor the adoption of a permit program thereunder were perfect in every respect. For example, authority was split between two federal agencies, the permit scheme appeared cumbersome and, most importantly, sewage was specifically exempted from the Act's statutory prohibition. See *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966); S. Rep. No. 414, 92d Cong., 1st Sess. 5, 8, 70 and 71 (1971). See also 117 Cong. Rec. 38845-46 (1971) (colloquy between Senators Curtis and Muskie, with additional statements by Senators Buckley and Cooper).

tion as to the Senate's conception of what "navigable waters" were and what its definition was expected to include.

2. On its face, the House bill's definition of "navigable waters" was somewhat narrower in scope than its Senate counterpart: it made no reference to tributaries and would have simply defined "navigable waters" as being "the navigable waters of the United States."<sup>31</sup> The report language accompanying H.R. 11896 is quite cryptic:

One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972).

Although the committee apparently felt compelled to define this term because the Senate had done so in its bill, the definition selected accomplished precisely the same result as if no definition had been provided (i.e., by defining navigable waters in a circular fashion, no effective definition was given to the term). Had the bill not defined the term and had no definition been included in the Act, the term "navigable waters" would have been subject to administrative interpretation. Prior administrative definitions of "navigable waters," however, had been far less inclusive than permitted under the case law, apparently because of administrative considerations. To prevent this from recurring in the future, the committee stated that the broad judicial interpretations of the "navigable waters" concept

<sup>31</sup>H.R. 11896, 92d Cong., 2d Sess. §502(8) (1972). Since the committee also saw the geographic scope of the bill as being identical to then existing coverage under the Refuse Act (see discussion *infra* pp. 14-15 and since the Refuse Act prohibition upon the discharge of pollutants applies to navigable waters and tributaries thereof, this omission was of little practical significance.

should control, not administrative concerns over ease of application or efficiency.<sup>32</sup>

That the House recognized the committee bill definition to be less inclusive than all waters, wherever located and however found, is made clear by the floor debate over amendments which would have expanded the bill's enforcement provisions to encompass all ground waters.<sup>33</sup> Significantly, no party to that debate argued that the amendments were unnecessary because ground waters were already included under the definition of "navigable waters." Every participant recognized that ground waters were *not* within the definition and, therefore, argued the substantive merits of whether the bill's controls should extend to groundwater.

The House bill also addressed the relationship between the Refuse Act and the FWPCA, but it went even further than the Senate bill and equated the two Acts permitting programs.<sup>34</sup> The House clearly contemplated that the geographic scope of the new permit program would be the same as the then existing scope of the Refuse Act.<sup>35</sup> Had the committee perceived that "navigable waters" would be any more expansive, surely some comment to that effect would have appeared in the legislative history. This is especially true when one recalls the contentiousness with which the 1961 Amendments were greeted in the same committee under the same chairman (Representative Blatnick), as well as on the floor.<sup>36</sup>

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<sup>32</sup>As discussed above, the Corps' original definition of "navigable waters" under the Refuse Act was overly constrained. This shortcoming was largely remedied by its later adoption of regulations more in tune with the judicial precedents. 37 Fed. Reg. 18289 (1972).

<sup>33</sup>118 Cong. Rec. 10666-69 (1972).

<sup>34</sup>H.R. 11896, 92d Cong., 2d Sess. §402(a)(4) (1972).

<sup>35</sup>H.R. Rep. No. 911, 92d Cong. 2d Sess. 125-26, 166-67, 398-405 (1972) (Additional views of Reps. Abzug and Rangel), and 414 (letter of Rep. Dingell, *et al.*). Since sections 402(a)(4) and (5) of the bill later became law, their history is especially pertinent here.

<sup>36</sup>See discussion *supra* p. 8.

In short, no one<sup>37</sup> considered the bill as resulting in any expansion of federal jurisdiction beyond preexisting law, particularly the Refuse Act, and the judicial interpretations of the term "navigable waters."

3. Due to the many differences between S. 2770 and H.R. 11896, they were submitted to conference. The conferees considered the House definition of "navigable waters" to be "basically the same as provided in the Senate bill" and adopted the same cryptic language contained in the report accompanying H.R. 11896.<sup>38</sup> The most instructive background on the conference substitute is to be found in the views expressed by the floor managers: Senator Muskie and Representative Dingell.

Senator Muskie presented a carefully prepared, detailed discussion of the Senate conferees' views on the floor. As to the definition of "navigable waters," he offered the following:

One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."

The Conference agreement does not define the term. The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provision and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in

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<sup>37</sup>See also Hearings on H.R. 11896 before the House Committee on Public Works, 92d Cong., 2d Sess. 306-07 (1972) (statement of the EPA Administrator); 118 Cong. Rec. 36775-81 (1972) (letter from the EPA Administrator urging support for the conference bill).

<sup>38</sup>S. Rep. No. 1236, 92d Cong., 2d Sess. 143-44 (1972). As to the relationship between the Refuse Act and FWPCA, the conferees agreed to the Senate bill, as revised by the House amendments. *Id.* at 139.

fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

118 Cong. Rec. 33699 (1972). The statement of Representative Dingell is to the same effect.<sup>19</sup>

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<sup>19</sup>In referring to the definition of "navigable waters" he stated:

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability — derived from the Daniel Ball case (77 U.S. 557, 563) — to include waterways which would be "susceptible of being used \*\*\* with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, *et cetera* *United States v. Utah*, 283 U.S. 64 (1921); *United States v. Appalachian Electric Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945); cert. den., 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) cert. den., 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA 2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power \*\*\* To regulate commerce with Foreign Nations and among the several states \*\*\*" (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although

Clearer expressions of legislative intent could hardly be imagined. Reading these statements either alone or in light of the extensive legislative and judicial history of the term "navigable waters," the following can be stated unequivocally: First, the term "navigable waters" was to include all water bodies under the expanded *judicial* interpretation of that term — not administrative determinations that had been or may be made for ease or efficiency; and Second, once such water bodies were defined in spatial terms, the federal interest in protecting these "navigable waters" from pollution would apply. To view these statements in any other light as reflecting something more would be inconsistent not only with the words used but also with the language and history of the Act when read as a whole, particularly the legislative history of section 402(a)(4), 33 U.S.C. §1342(a)(4) (1982).

Section 402(a)(4) "deems" all permits issued under the Refuse Act to be permits issued under the FWPRA. Had Congress believed that the geographic scope of the Refuse Act was deficient

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most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation — highways, railroads, air traffic, radio and postal communication, waterways, *et cetera*. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972) [sic].

Thus, this new definition clearly encompasses all water bodies, including mainstreams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

in any respect, it could have simply grandfathered Refuse Act permits and then repealed that Act. Instead, Congress not only retained the Refuse Act but also "deemed" all permits issued under the new law to be Refuse Act permits, thereby indicating its intent that the geographic scope of the new program would be the same as that of the Refuse Act. Although criticisms of earlier, crabbed *administrative* determinations under that Act had been raised, the relevant legislative history of the 1972 Amendments is totally devoid of any comment indicating that the geographic scope of "navigable waters" under the Refuse Act, as determined by the case law, was in any respect deficient.

Nowhere in the discussion, debate or reports that accompanied this legislation is there any mention made that the Commerce Clause power being exercised was to be interpreted as anything other than the exercise of that power as it had been applied to waterborne commerce. Each and every one of the numerous court decisions cited in that history dealt with Commerce Clause power as that power is defined by reference to waterborne commerce.<sup>40</sup> Had Congress believed that the constitutional power then being exercised was something more, surely at least one such citation would have been given.<sup>41</sup> This glaring absence is, of course, unexplained by the government because it ascribes an intent to the 92nd Congress that simply did not exist.<sup>42</sup>

With full knowledge of what the term "navigable waters" meant and how it had been interpreted by the courts, Congress passed the Federal Water Pollution Control Act Amendments of 1972 on October 18, 1972.

<sup>40</sup>See references cited and quoted *supra* note 39.

<sup>41</sup>See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 100 (1941).

<sup>42</sup>Brief for the United States at pp. 19-21.

### III. Subsequent Regulatory Developments, In Response To Litigation, Ignored The Totality Of The Act's Legislative History And Expanded Federal Control To Include Wet Lands Periodically Inundated By "Navigable Waters."

Following enactment of the 1972 Amendments, the Corps embarked upon rulemaking to develop regulations implementing section 404 of the Act, 33 U.S.C. §1344 (1982). By the time it published final regulations,<sup>43</sup> jurisdiction under the Refuse Act over navigable waters and tributaries thereof had been firmly established.<sup>44</sup> Despite clear legislative intent to cover tributaries under the Act's definition of "navigable waters," the Corps elected to exclude tributaries from its regulatory control.<sup>45</sup>

Not surprisingly, the Corps' limited assertion of jurisdiction<sup>46</sup> resulted in litigation. On cross motions for summary judgment, the district court quite correctly declared that the defendants

<sup>43</sup>39 Fed. Reg. 12115 (1974).

<sup>44</sup> See *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655 (1973).

<sup>45</sup>In EPA's definition of this same statutory term, the tributaries of navigable waters properly fell within the reach of its permitting authority. 40 C.F.R. §125.1(p) (1975). EPA's definition went considerably further, however, and included all waters utilized by interstate travelers or by industrial facilities engaged in interstate commerce and all waters from which fish or shellfish are taken and sold in interstate commerce. Although inclusion of these other "waters" may well have been beyond congressional intent, at least this expansion was limited to existing, identifiable water bodies (i.e., "intrastate lakes, rivers and streams"). More significantly, EPA's definition of "navigable waters" did not then include wetlands.

<sup>46</sup>It may well be that the Corps then considered section 404 as being no more than a continuation of its power under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403 (1982), to authorize the excavation or filling of any navigable water of the United States. Indeed, such a view at least finds some support in the legislative history:

The Conference were uniquely aware of the process by which the dredge and fill permits are presently handled and

had "acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act." *Natural Resources Defense Council, Inc. v. Callaway*, 329 F. Supp. 685, 686 (D.D.C. 1975). In a cryptic opinion, most notable for its excessive brevity, the district judge opined that the statutory definition served to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause" and that "the term ['navigable waters'] is not limited to the traditional tests of navigability." *Id.*

The court's holding was clearly correct. The language used to justify that holding was also correct, if somewhat misleading because of its brevity. As discussed previously, the Commerce Clause power referred to in the 1972 legislative history was *not* to the full panoply of that power as is sometimes seen in the decisions of this Court, but to the maximum extent of that power as it had been applied to waterborne commerce. Further, because of the Corps' obvious error in refusing to exercise jurisdiction over tributaries, there can be no question but that its jurisdictional definition of "navigable waters" could not be limited to the traditional tests of "navigability." So considered, both cited rationales were correct. The government did not appeal, electing instead to proceed with rulemaking pursuant to the court's order.<sup>47</sup>

The Corps proposed new regulations on May 6, 1975 and promulgated interim final rules on July 25, 1975.<sup>48</sup> The original

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did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed.

<sup>47</sup>118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie). See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 130 (1972). Unlike the Refuse Act, 33 U.S.C. §407 (1982), section 10 makes no reference to excavating or filling the tributaries of navigable waters.

<sup>48</sup>As subsequent regulatory developments and this litigation suggest, it may have been that the government was not opposed to asserting broad federal jurisdiction over all waters and all wet land, unencumbered by the constitutional constraints concerning waterborne commerce recognized in the Act's legislative history.

<sup>49</sup>See 40 Fed. Reg. 19766 (1975) and 40 Fed. Reg. 31320 (1975). The development and promulgation of these regulations are unusual in

proposal presented four alternatives, the first of which included a broad assertion of federal regulatory jurisdiction under essentially federal control. It was this approach that was later adopted in the interim final rules.

As proposed, Alternative I would have defined "navigable waters" as including seven discrete types of water bodies, the extent of each being up to the headwaters and shoreward to the ordinary high water mark<sup>49</sup> or to the aquatic vegetation line, whichever extended further.<sup>50</sup> The "aquatic vegetation line" was then defined as "the line beyond which aquatic plants, dependent on periodic inundation for growth, do not thrive."<sup>51</sup> Although wetlands were not separately defined, adoption of the "aquatic vegetation line" clearly would have resulted in many contiguous wetland areas being covered under this approach.<sup>52</sup>

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that the controversy spawned by Judge Robinson's decision and the Corps' regulatory response resulted in extensive hearings in the House of Representatives (*Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975) (hereinafter cited as House 404 Regulatory Hearings)) and the Senate (*Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976) (hereinafter cited as Senate 404 Regulatory Hearings)).

<sup>49</sup>For tidally influenced waters, the proposed limit was to the monthly high tide line. 40 Fed. Reg. 19766 (1975).

<sup>50</sup>40 Fed. Reg. 19770 (1975). The seven designated water bodies were: inland navigable waters and tributaries thereof; tidally influenced water bodies; inland interstate waters; and inland intrastate lakes, rivers and streams which are used by interstate travellers, from which fish are taken and sold in interstate commerce or which are utilized for industrial or agricultural purposes by those engaged in interstate commerce. Cf. 40 C.F.R. §125.1(p) (1975) (EPA's definition of "navigable waters").

<sup>51</sup>40 Fed. Reg. 19770 (1975).

<sup>52</sup>In its earlier regulations, the Corps had defined wetlands, for non-jurisdictional purposes, as "those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally in-

The interim final regulations simply reorganized the proposed definition described above.<sup>53</sup> Instead of repeating the phrase "or to the aquatic vegetation line, whichever extends further" to describe each of the designated water bodies and then separately defining the aquatic vegetation line, the interim final regulations established separate definitions for "coastal wetlands" and "freshwater wetlands."<sup>54</sup> A comparison of these "wetland" definitions with the earlier "aquatic vegetation line" definition shows that exactly the same areas would be covered under each formulation.

Under the aquatic vegetation approach, the areas to be covered could go no further than the limits of periodic inundation because the required vegetation must be "dependent on periodic inundation."<sup>55</sup> The areas to be covered under the coastal/freshwater wetlands approach were limited to those areas that are periodically inundated by salt, brackish or fresh water *and* that are normally characterized by the prevalence of

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cluded were inland and coastal shallows, marshes, mudflats, estuaries, swamps and similar areas *in coastal and inland navigable waters*. 39 Fed. Reg. 12115, 12121 (1974) (emphasis added). Clearly, the definitions proposed in 1975 were largely a reiteration of this earlier definition, but now in a jurisdictional context. Cf. Preamble, 40 Fed. Reg. 19767 (1975).

<sup>53</sup>Compare 33 C.F.R. §209.120(d)(2) (1977) with Proposed 33 C.F.R. §209.120(d)(2) (Alternative I), 40 Fed. Reg. 19770 (1975). To make its expanded permitting authority more manageable, the Corps exempted a wide variety of activities from its regulatory control, 33 C.F.R. §209.120(d)(4), (5) and (6) (1977), and instituted a mechanism for the issuance of general permits for certain non-exempt activities, 33 C.F.R. §209.120(i)(2)(ix) (1977).

<sup>54</sup>Coastal wetlands were defined as "those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction." Freshwater wetlands were defined as "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. § 209.120(d)(2)(i)(b), (h) (1977).

<sup>55</sup>40 Fed. Reg. 19767 (1975).

vegetation that requires saturated soil conditions. Thus, both approaches required that the area be periodically inundated by navigable waters<sup>56</sup> in order to be included within the general scheme of regulatory controls.<sup>57</sup>

#### IV. Because The 1977 Amendments Did Not Alter The Definition Of "Navigable Waters," Its History Cannot Be Used To Discern The Intent Of Congress When It Defined That Term In 1972 (This History May, However, Evidence A Legislative Ratification Of The Corps' 1975 Rules).

In support of its asserted jurisdiction over certain land areas that are periodically wet, the government places heavy reliance upon the 1977 Amendments to the FWPCA.<sup>58</sup> Although the section 404 permit program was substantially revised in 1977 and although revised definitions were proposed and defeated,<sup>59</sup>

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<sup>56</sup>The unique legislative history of these regulations makes clear that the intent of the drafters was that periodic inundation be by way of flooding from adjacent, navigable waters and not by rainfall collecting at the site or by inundation from ground water sources. See House 404 Regulatory Hearings at 4, 6-7, 10-11, 31, 74. It is also noteworthy that numerous environmental groups supported the definitions contained in these interim final regulations. See Senate 404 Regulatory Hearings 213 (National Audubon Society), 327 (Natural Resources Defense Council), 391 (National Wildlife Federation), 450 (The Sport Fishing Institute), and 454 (Conservation Foundation). Indeed, as conceded by Mr. Speth (NRDC): "It may well be that the implications of Section 404 are larger than Congress originally envisioned." Senate 404 Regulatory Hearings 327.

<sup>57</sup>Although vague, open-ended authority to include other areas (e.g., intermittent streams and isolated wetlands) within regulatory coverage appears, this was a discretionary authority, to be exercised by the District Engineer on a case-by-case basis where necessary to protect water quality. 33 C.F.R. §209.120(d)(2)(i)(i) (1977). A careful review of the legislative history of these regulations shows that little, if any, attention or consideration was given to this new provision. In any event, we are unaware of any circumstances in which this discretionary, site-specific authority was ever exercised by a District Engineer.

<sup>58</sup>Brief for the United States at pp. 22-27.

<sup>59</sup>It is hornbook law that the failure of Congress to act is an exceedingly slender reed upon which to base an implied expression of

Congress did not alter the definition of "navigable waters." Thus, the history which preceded and culminated in the adoption of the 1972 Amendments should be controlling on the issue of legislative intent.<sup>60</sup> At most, the 1976-1977 legislative history can be read as tacit ratification by Congress of the Corps' 1975 interim final regulations. To read one whit more into that history or to suggest that Congress intended federal jurisdiction to extend one inch further would constitute a gross perversion of statutory construction and legislative intent and would serve to allow individual legislators and well-intentioned federal officials to dictate the intent of Congress.

In the 1976 legislative session the House Committee on Public Works reported out a bill<sup>61</sup> which, if passed, would have clarified federal jurisdiction over "navigable waters" by rendering inapplicable those judicial precedents which had recognized that "navigable waters" include historically navigable waters and that "navigable waters," once defined in fact, were forever to be considered navigable in law. By a vote of 234 to 121, the Committee approach was amended on the floor to add a reference to "adjacent wetlands."<sup>62</sup> Significantly, the term "adjacent wetlands" was there defined in precisely the same manner as the Corps' 1975 definition of coastal and freshwater wetlands.<sup>63</sup>

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legislative intent. See, e.g., *Federal Trade Commission v. Dean Foods Company*, 384 U.S. 597, 608 (1966); *United States v. Wise*, 370 U.S. 405, 414 (1962); *Helvering v. Hallock*, 309 U.S. 106, 120 (1940).

<sup>60</sup>See *Regional Rail Reorganization Cases*, 419 U.S. 102, 132 (1974); *United States v. Mine Workers of America*, 330 U.S. 258, 282 (1974); *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 639 n.34 (1967).

<sup>61</sup>H.R. 9650, §17, Federal Water Pollution Control Act Amendment of 1976, reprinted in H.R. Rep. No. 1107, 94th Cong., 2d Sess. (1976).

<sup>62</sup>123 Cong. Rec. 16564-65 (1973). This amendment, proposed by Representative Wright and commonly referred to as the Wright Amendment, *Id.* at 16552, was fully discussed on the floor of the House before passage. *Id.* at 16552-59.

<sup>63</sup>Compare 122 Cong. Rec. 16572 (1976) with 33 C.F.R. §209.120(d)(2)(i)(b), (h) (1977).

The Senate Committee on Public Works then sent a bill to the floor which took a slightly different approach.<sup>64</sup> On the floor, Senator Tower proposed the Wright Amendment, which initially passed by a vote of 39 to 38.<sup>65</sup> Senator Baker then arrived and after winning two procedural votes achieved passage of the Baker-Randolph Amendment.<sup>66</sup> The Senate and House proposals were sent to conference, but a compromise could not be reached and both bills died.

House action again preceded Senate consideration of FWPCA amendments in 1977. The Committee on Public Works reported out a bill (H.R. 3199) which reflected the Wright Amendment approach to geographic scope.<sup>67</sup> Efforts to amend this approach on the floor failed,<sup>68</sup> and the bill passed the House by a vote of 361 to 43 on April 5, 1977.<sup>69</sup>

Senate consideration was equally swift. The Committee on Environment and Public Works reported out a bill (S. 1952) on July 28, 1977, which again reflected the Baker-Randolph approach.<sup>70</sup> Senate Bentson proposed the Wright Amendment on the floor, but it failed by a vote of 45 to 51.<sup>71</sup> After passage of the bill on August 4, 1977, it and H.R. 3199 were sent to conference.

The conferees agreed not to alter the definition of "navigable waters," electing instead to exempt a host of activities from federal controls and to authorize expressly the continued issuance by the Corps of nationwide and regional general permits.

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<sup>64</sup>By a vote of 7 to 6, the Committee approved an amendment proposed by Senators Baker and Randolph. The text of the Baker-Randolph Amendment is found at 122 Cong. Rec. 28776-78 (1976).

<sup>65</sup>122 Cong. Rec. 28793 (1976).

<sup>66</sup>122 Cong. Rec. 28794-95 (1976).

<sup>67</sup>H.R. Rep. No. 139, 95th Cong., 1st Sess. 44-46 (1977). See also *Id.* at 20-25.

<sup>68</sup>123 Cong. Rec. 10426-32 (1977).

<sup>69</sup>123 Cong. Rec. 10434 (1977).

<sup>70</sup>S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977).

<sup>71</sup>123 Cong. Rec. 26710-29 (1977). It is interesting to note that as of that date no less than 406 members of the 95th Congress had voted to approve the Wright approach while only 94 were opposed.

Both these approaches, reflected in the Corps' 1975 regulations and extensively discussed during the 1975-1976 regulatory hearings,<sup>72</sup> confirmed in law what the Corps had been doing administratively. Moreover, numerous statements in the reports and debates throughout the 1977 legislative session show a remarkable awareness of and familiarity with the Corps' 1975 regulations.<sup>73</sup> Thus, the 1977 Amendments and their legislative history<sup>74</sup> may constitute an effective legislative ratification of the Corps' interim final rules.<sup>75</sup>

The only report language cited by the government from this history is referred to as being "particularly significant because it demonstrates beyond peradventure Congress' understanding of the Corps' [phased implementation under its interim final regulations]."<sup>76</sup> To the extent this report language indicates

<sup>72</sup>House 404 Regulatory Hearings, *supra*, and Senate 404 Regulatory Hearings, *supra*.

<sup>73</sup>As to phased implementation, a concept only applicable under the Corps' interim final regulations, see S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977); 123 Cong. Rec. 26720 (1977) (statement of Sen. Hart); *Id.* at 26714-16 (statement of Sen. Stafford); H.R. Rep. No. 139, 95th Cong., 1st Sess. 22 (1977); 123 Cong. Rec. 38969 (1977) (statement of Rep. Roberts); 123 Cong. Rec. 39208-09 (1977) (statement of Sen. Baker). As to general permits, see 123 Cong. Rec. 26714-15 (1977) (statement of Sen. Stafford); *Id.* at 26770-71 (statement of Sen. Nunn); S. Rep. No. 370, 95th Cong., 1st Sess. 80 (1977); H.R. Rep. No. 830, 95th Cong., 1st Sess. 100 (1977); 123 Cong. Rec. 39209 (1977) (statement of Sen. Baker). As to the enumerated exemptions from permitting requirements, see S. Rep. No. 370, 95th Cong., 1st Sess. 75-77 (1977); 123 Cong. Rec. 26766-67, 26772-73 (1977) (statements of Senators Dole, Muskie, Allen, Church and Randolph); H.R. Rep. No. 830, 95th Cong., 1st Sess. 105 (1977); 123 Cong. Rec. 39209-11, 39216-17 (1977) (statements of Senators Baker, Wallop and Heinz).

<sup>74</sup>P.L. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§1251-1376 (1982)).

<sup>75</sup>See *Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983) and cases cited therein.

<sup>76</sup>S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977), referred to in the Brief of the United States at pp. 23-24 n.16.

legislative ratification of 1975 regulations, it may be relevant here, but it does not and cannot be used to support a broader assertion of federal jurisdiction beyond the contours of the 1975 regulations.

Had Congress then affirmatively redefined the term "navigable waters," the 1977 legislative history, including the statements of individual members, could be useful in discerning congressional intent, but such did not occur. Since no change to the statutory definition was made, the controlling history on the proper interpretation of "navigable waters" must be the 1972 history and its antecedents – not the post-hoc views of individual Congressmen and Senators.<sup>77</sup> Although a limited exception may apply where clear legislative ratification of administrative action occurs, such cannot serve to alter the fundamental premise of and asserted constitutional basis for enacting amendments to the FWPRA in 1972.<sup>78</sup>

#### V. The Corps' Unprecedented Administrative Expansion Of Federal Jurisdiction In 1977 To Include Certain Lands Within Its Definition Of "Navigable Waters" Was Contrary To Congressional Intent Expressed In 1972 And Well Beyond Any Limits Considered By Congress In 1977.

The Corps greatly expanded the apparent scope of its regulatory jurisdiction when it redefined the term "navigable waters" in 1977 to include "wetlands," which it then defined as

those areas that are *inundated or saturated by surface or groundwater* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

(emphasis added).<sup>79</sup> Whereas the 1975 definition required periodic *inundation by navigable waters* and the presence of

<sup>77</sup>As cited by the government, Brief of the United States at 24-27.

<sup>78</sup>See discussion *supra* 15-17 & note 39.

<sup>79</sup>42 Fed. Reg. 37122, 37144 (1977). Whereas the 1975 regulations were thoroughly reviewed and considered by Congress, only a handful

vegetation that requires saturated soil conditions, the 1977 revisions retained neither requirement. By administrative edict, lands merely saturated by rainwater or groundwater were then deemed to be "navigable waters" if certain types of vegetation are also present.<sup>80</sup>

The fear of the court below is well founded:<sup>81</sup> low-lying backyards may now be subject to the full panoply of federal

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of isolated references to the 1977 regulations appear anywhere in the legislative history, and each of these is wholly devoid of anything more than a simple reference to their existence. See 123 Cong. Rec. 26718-19 (1977) (statement of Sen. Baker); *Id.* at 26721-22 (statement of Sen. Tower); 123 Cong. Rec. 10427-28 (1977) (statement of Rep. Smith). *Compare with* references cited, *supra* note 73. Thus, it cannot be contended seriously that Congress also legislatively ratified the 1977 regulations.

<sup>80</sup>The types of vegetation used to identify wetlands under this regulation include trees and other species that merely tolerate moist soil conditions to grow and reproduce. See U.S. Department of Interior, Fish and Wildlife Service, *Classification of Wetlands and Deep Water Habitats of the United States* (1979); U.S. Army Engineer Waterways Experiment Station, Dept. of Army, *Wetlands Delineation Manual*, Rpt. No. Y-84 (1985 Draft).

<sup>81</sup>As observed by the court in its order denying the government's petition for rehearing:

The government and organizations filing as amicus curiae would apparently have the Court by injunction prevent the owner from using low lying areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into "navigable waters" by the Court without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable waters. Under such a construction, low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is overbroad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction.

*United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 401 (6th Cir. 1984).

power under the Corps' 1977 regulatory definition. If one levels his low-lying backyard without first applying for and receiving a Corps permit, he risks civil penalties of up to \$10,000 per day plus criminal fines of up to \$25,000 per day plus imprisonment for up to a year.<sup>82</sup> Surely, this could not have been intended by Congress, yet this logically follows from the government's position defending the full sweep of its regulations as written.<sup>83</sup> Accordingly, to the extent the 1977 regulations extended the term "navigable waters" beyond the reach of the 1975 regulations, such action was unlawful and well beyond any conceivable intent of Congress expressed in the Act's relevant legislative history.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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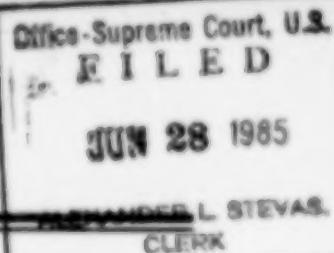
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June 28, 1985

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<sup>82</sup>FWPCA §309, 33 U.S.C. §1319 (1982).

<sup>83</sup>Since the definition of "navigable waters" applies to permits under section 402, as well as to permits under section 404, and since a sprinkler is unquestionably a point source, it is at least possible that a section 402 permit must also be applied for before that individual waters his backyard. If he does not, he may face the same potential civil and criminal sanctions. Of course, one would expect that EPA and the Corps would exercise their enforcement discretion and not prosecute such offenders (if the government were to prevail here).



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,  
v. *Petitioner,*

RIVERSIDE BAYVIEW HOMES, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION,  
NATIONAL CATTLEMEN'S ASSOCIATION, AND  
RESOURCE DEVELOPMENT COUNCIL FOR ALASKA,  
INC. IN SUPPORT OF RESPONDENTS

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### **QUESTION PRESENTED**

Whether federal jurisdiction under the Clean Water Act to regulate discharges into "navigable waters" extends to areas which are occasionally inundated or saturated from sources having no hydrologic connection to any lake, stream, river, or tributary.

1

(i)

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

No. 84-701

UNITED STATES OF AMERICA,  
v.  
*Petitioner,*

RIVERSIDE BAYVIEW HOMES, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION,  
NATIONAL CATTLEMEN'S ASSOCIATION, AND  
RESOURCE DEVELOPMENT COUNCIL FOR ALASKA,  
INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation, the National Cattlemen's Association, and the Resource Development Council for Alaska, Inc., respectfully submit this brief amicus curiae in support of the respondents, Riverside Bayview Homes, Inc., et al. Consent to the filing of this brief has been obtained from counsel for all parties and copies of these consent letters have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt, public interest organization with over 19,000 contributors and supporters located throughout the country and with offices in Sacramento, California, and Wash-

ington, D.C., and liaison offices in Seattle, Washington, and Anchorage, Alaska.

Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved. PLF has especially stressed this approach in the area of land use regulation and also where environmental issues are concerned.

The Resource Development Council for Alaska, Inc. (RDC), and the National Cattlemen's Association represent private property owners throughout the United States. While the specific activities and objectives of each of these organizations are unique, both share a concern about the regulation of waters and wetlands under Section 404 of the Clean Water Act (CWA). 33 U.S.C. § 1344.

RDC is a statewide citizens' group, based in Anchorage, Alaska, with a membership of approximately 10,000 individuals, labor unions, businesses, regional native corporations, municipalities, chambers of commerce, and trade associations. The objective of RDC is to assist in the creation of a broad-based economy in Alaska, with long-term stable employment, orderly growth, and improved living standards for Alaskans. RDC is particularly interested in helping to assure the rational development of Alaska's vast natural resources, which are of vital importance to the nation's energy, mineral, forest products, and food production needs.

The National Cattlemen's Association (NCA) is a non-profit trade organization representing over 245,000 professional cattlemen throughout the United States. NCA's headquarters is located in Denver, Colorado. The purpose of NCA is to provide an organization through which

all segments of the beef cattle industry, including cattle breeders, producers, and feeders, may work toward solutions of industry problems and may inform the public about issues related to the industry.

#### SUMMARY OF THE ARGUMENT

The Sixth Circuit's interpretation of the Army Corps of Engineers' (Corps) Section 404 wetlands definition provides necessary relief for private property owners who have often been unjustifiably subjected to the rigors of the Section 404 process due to the vague and overly broad nature of the Corps' jurisdictional terms. The ruling by the Sixth Circuit establishes a palpably sensible and legally supportable test for making jurisdictional determinations under Section 404 which will reduce considerably the regulatory burdens presently imposed on property owners.

The Sixth Circuit's decision is entirely consistent with the goals and objectives of the CWA in that it maintains environmental protection over traditionally navigable waters and their tributaries as was originally intended by Congress in the 1972 Federal Water Pollution Control Act (FWPCA). In addition, to the extent Congress sought to protect wetlands under its 1977 amendments to FWPCA, the lower court's jurisdictional test also encompasses those swamps, marshes, and bogs which are hydrologically connected and, therefore, possibly environmentally critical to navigable waters and their tributaries.

#### INTRODUCTION

Section 404 of the CWA was enacted by Congress in 1972 as part of the amendments to the FWPCA. (FWPCA was renamed the CWA under the 1977 amendments.) Pursuant to this Section, the Corps is authorized to regulate the discharge of dredged or fill material into the navigable waters of the United States. It can safely be contended that there are few, if any, federal environ-

mental programs that have had a more compelling and pervasive impact on private property rights in this country than Section 404. The conflict which has evolved between the constitutional rights of property owners to the reasonable use of their land and the desire to protect and preserve our aquatic environment has quite often been fought within the Section 404 arena. As a result, numerous property owners, who have been denied discharge permits under Section 404, have been forced to bear the cost of environmental preservation through the loss of valuable property rights—a cost which in all fairness and equity should be borne by the benefited society.

While the economic impacts associated with Section 404 are indeed of great concern to many, the most critical issue regarding Section 404 lies in the uncertainty over the Corps' regulatory jurisdiction under the CWA. The lack of any specific clarification regarding the term "navigable waters" in the CWA has resulted in much confusion and controversy over the jurisdictional scope of Section 404. Initially, the Corps viewed its jurisdiction as being coterminous with that under the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §§ 401, *et seq.* Pursuant to the RHA, the Corps prescribed its jurisdiction on the basis of the traditional or historical definition of "navigable waters"—*i.e.*, those waters that "are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1984). The Corps' attempt to define its jurisdiction in this manner did not, however, survive judicial scrutiny. In 1975, the United States District Court for the District of Columbia held that Congress intended for the Corps to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. The term "navigable water" for purposes of the FWPRA was not, therefore, limited to the RHA's traditional test of naviga-

bility. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Subsequent to the decision in *Callaway*, the Corps amended its definition of "navigable waters" to include, among other aquatic areas, "wetlands." Proponents of this expanded jurisdiction contend that it is fully consistent with the goals of the CWA and with the intent of Congress. Opponents of such expansive regulatory jurisdiction, however, argue that the CWA was designed to *protect water quality, not to preserve wetland areas.*

The absence of any direct congressional action on the issue of jurisdiction, coupled with the administrative mismanagement of the Section 404 program, has resulted in the imposition of unjustifiable burdens on individual property owners such as Mr. George Short, the owner of Riverside Bayview Homes. While academicians, lawyers, and legislators debate over the permissible bounds of the Corps' jurisdictional authority under Section 404, private property owners like Mr. Short are being continually subjected to an administrative process which has oftentimes resulted in a complete deprivation of private property rights. The need to recognize and to respect such rights was in fact underscored by the Sixth Circuit in the case at bar. The Court of Appeals specifically noted that the "exercise of apparently unbounded jurisdiction by the Corps" over waters within the United States raises a serious taking problem under the Fifth Amendment to the Constitution. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 398 (6th Cir. 1984), Appendix to Petition for Certiorari (Pet. App.) at 15a.

This case brings before this Court many of the more perplexing problems which have beset Section 404 since its inception. At the very least, this case will decide whether Mr. Short's property falls within the Corps' current wetlands definition, and will thereby hopefully enable him to terminate ten years of legal and adminis-

trative battles in the vindication of his property rights. On a much larger scale, however, this case will also decide to what extent the Corps may exercise regulatory jurisdiction over the nation's waters under the CWA.

#### **ARGUMENT**

##### **I. THE SIXTH CIRCUIT WAS CORRECT IN HOLDING THAT THE RIVERSIDE PROPERTY DOES NOT CONSTITUTE A WETLAND SUBJECT TO THE ARMY CORPS' JURISDICTION**

The Sixth Circuit's determination that Mr. Short's property does not constitute a wetland was based, in part, on its perception, which amici fully support, that Congress could not have intended for the CWA "to cover a piece of property [Riverside] a mile inland from Lake St. Clair which has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed." *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 13a-14a. The court determined that the Corps' wetland regulation requires a hydrologic connection between the property alleged to be a wetland and a navigable water as defined in the CWA. *Id.*

As will be shown below, the Court of Appeals' interpretation of the wetlands regulation is entirely consistent with the objectives and goals articulated in the CWA and with congressional intent underlying the Act. It also provides a more reasonable and equitable method for asserting jurisdictional claims under Section 404 and protects private property owners from excessive and unwarranted federal regulation of their land.

###### **A. The Jurisdictional Terms Related To Implementation of Section 404 Have Led To Unreasonable and Unjustified Impacts on Private Property Owners**

Since its inception in 1972, Section 404 of the CWA has been plagued with uncertainties related to its intended scope. Private property owners planning activi-

ties in the vicinity of waters of the United States, as well as in areas totally unrelated to such waters, have frequently been uncertain as to whether a Section 404 permit was required and have often been required to obtain permits or modify projects *after* they have begun or have even been completed. Much of this confusion on the part of landowners stems from the fact that Section 404, which was clearly intended by Congress to be a means for protecting the quality of our nation's waters, has inexplicably evolved into a national wetlands protection statute.

In order to fully understand and appreciate the irrationality of the current jurisdictional scope of Section 404, one need only look at several representative case examples of uncertainty and delay related to the ambiguity of the jurisdictional terms. The case of Madrona Marsh in Torrance, California, is a case in point.

In February, 1980, the Corps asserted Section 404 jurisdiction over an area known as Madrona March. Portions of this land area are subject to inundation during and immediately following the rainy season. The waters which accumulate in the area do not arrive through any waterways, nor do they ultimately end up in any public body of water such as a river, stream, lake, reservoir, bay, gulf, sea, or ocean. At present, most of the water is supplied through two drainage ditches designed to transmit rainfall. According to Army Corps documents, the area has

"no underground water source from springs . . . and is maintained as a wetland during the wet season due to an impermeable clay soil layer which prevents percolation, and to a lesser extent, transpiration. The surface water which collects during the wet season is not connected with the ground water table, and the marsh has no outlet. As such, it is an isolated [intermittent] wetland." Army Corps Determination of Jurisdiction Under Clean Water Act

—Madrona Marsh, Torrance, California, at 1-2 (issued by Homer Johnstone, Brigadier General, USA Division Engineer), Army Corps, Los Angeles District, Los Angeles, California (June 14, 1982).

A capsulization of the events that have occurred in this matter points out how the overly broad and imprecise definition of "waters of the United States" forces large and small property owners alike to proceed preliminarily through a cumbersome, costly, and seemingly endless administrative proceeding just to determine whether CWA jurisdiction may, in fact, be appropriately asserted.

In 1981, a petition for withdrawal of jurisdiction over Madrona Marsh was submitted to the Corps, and after the matter had been transmitted through the Environmental Protection Agency (EPA), the Corps reversed its initial position and concluded that it had no jurisdiction over Madrona Marsh. This, unfortunately, was not the end of the case.

In March, 1982, the Chief of Engineers, at the request of a group known as the "Friends of Madrona Marsh," ordered a complete review of the Section 404 jurisdiction over Madrona Marsh and reopened the record for additional "public participation." See Public Notice, issued March 26, 1982, Department of the Army, Los Angeles District, Corps of Engineers, Los Angeles, California. Finally, in June, 1982, the Corps conclusively determined that it had no jurisdiction over the Madrona Marsh area. See Army Corps Determination of Jurisdiction, *supra* at 7. It took an incredible two years and four months of bureaucratic processing just to determine whether or not jurisdiction could be properly asserted over this site.

It must be borne in mind that the 28 months of administrative processing in the Madrona Marsh case were utilized *only* to determine if jurisdiction existed; once the jurisdictional issue is resolved, however, a property owner might then be required to wait an equally oppressive

length of time to receive a Section 404 permit.<sup>1</sup> Under the Sixth Circuit's decision below, an intermittent wet area such as Madrona Marsh would clearly fall beyond the regulatory jurisdiction of the Corps since no hydrological connection existed between the marsh and an adjacent lake, stream, or river. The exclusion of an area such as Madrona Marsh from the Corps' Section 404 program is clearly consistent with the goals of the Clean Water Act since the marsh in no way impacted upon the quality of our nation's navigable waters. Until the jurisdictional limits of the Corps' authority are firmly established, however, cases such as Madrona Marsh will continue to occur. The Madrona Marsh experience also serves to contradict the government's position that the current jurisdictional test "can be applied to particular parcels of land" with "relative ease." Petitioner's Brief (Pet. Brief) at 44. Surely, a 28-month entanglement with bureaucratic red tape does not signify a program that is applied with relative ease.

The Madrona Marsh scenario is only one example of the consequences of an imprecise statute and regulations governing the Section 404 program. While the property owner in this case could financially afford to pursue an administrative determination, there are thousands of small property owners subject to the Corps' regulations who cannot shoulder the burden. See example of Mr. Arnie Thomas, *infra* at 18.

These case studies are not simply aberrations from an otherwise easily administered and well-managed regulatory program. They are, instead, representative examples from a program drifting in a sea of limitless jurisdiction. Until the boundaries envisioned by Congress under the CWA are clearly ascertained and definitively marked, any attempt to chart a course for the program to sail by will invariably sink. The need to establish an "adequate limiting principle" regarding the Corps' jurisdiction was

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<sup>1</sup> See Case Summaries Nos. 1, 2, Appendix A at A-3, A-5.

specifically noted by the Sixth Circuit in its denial of the government's request for a rehearing *en banc*:

"By an unusual construction of the words 'navigable waters' in the Clean Water Act, the government and . . . amicus curiae would apparently have the Court by injunction prevent the owner from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into navigable waters without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable waters. Under such a construction low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is overbroad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction." *Riverside Bayview*, 729 F.2d at 401, Pet. App. at 20a-21a.

The numerous shortcomings of the Section 404 program, particularly its jurisdictional scope, were in fact revealed by the Presidential Task Force on Regulatory Relief in 1982. See Presidential Task Force on Regulatory Relief, Office of the Vice President, *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (Administrative Reforms) (May 7, 1982) (portions of this report are contained herein at Appendix A). This special Task Force, headed by Vice President Bush, specifically determined that the Section "404 program has been plagued by uncertainties over its jurisdictional scope [and that] [i]ndividuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required . . ." See Appendix A at A-7.

Concern over Section 404's seemingly limitless jurisdiction has also been echoed by the agency charged with

administering the program, the Corps of Engineers. William Gianelli, former Assistant Secretary to the Army for Civil Works, had been committed to reducing the jurisdictional scope of the program, impelled in his effort by the view "that the Section 404 program ha[d] gone far beyond its originally envisioned scope and, more importantly, beyond the appropriate role of the federal government in regulating the development of private and public resources."<sup>2</sup> Mosher, *When Is a Prairie Pothole a Wetland? When the Federal Regulators Get Busy*, Nat'l Journal 410, 412 (March 6, 1982). Mr. Gianelli was sympathetic to "protecting the nation's valuable wetlands" but he believed that "'a far better method [for doing this] would be for the Congress to legislatively identify and designate the true wetlands needing protection from all development rather than to try and afford incomplete protection through the piecemeal, backdoor approach applicable to landfill areas under the Corps' 404 program.'" *Id.*

As illustrated by the case studies cited above, and substantiated by the Task Force report and Mr. Gianelli's comments, the confusion generated by the Corps' unbounded Section 404 jurisdiction has had a devastating impact on private property owners. This impact has resulted not only from the unwarranted inclusion of all wetlands within the scope of Section 404 but also from the various "presumptions" regarding wetland values that have been built into the Corps' regulatory program. These presumptions further compound the problems affecting property owners in this country. They therefore provide additional evidence as to why the scope of the Corps' jurisdiction should be circumscribed in the manner expressed by the Court of Appeals.

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<sup>2</sup> Although the Corps has previously taken some steps to reduce the regulatory burden of Section 404, these attempts were not directed toward limiting the scope of jurisdiction. See 49 Fed. Reg. 39,478 (1984) (to be codified at 33 C.F.R. Parts 320, 323, 330).

**B. Not Only Have Wetlands Been Erroneously Embodied Within Section 404, But Invalid Presumptions Regarding Wetlands Have Also Been Incorporated Into the Corps' Regulatory Scheme**

While the “ecological value” of wetlands is not directly at issue in this case, amici believe that it is important for this Court to understand not only that all wetlands have been erroneously included within Section 404, but also that these areas have been improperly accorded special protections under the Corps’ regulations which severely reduce the likelihood that a permit will be granted once jurisdiction has been asserted. The nature of these presumptions and their impact on the Section 404 permit process substantially refute the government’s position that “the mere assertion of regulatory jurisdiction does not . . . mean that a permit will be denied” and also its contention that the current wetlands regulation reflects good science. Pet. Brief at 11, 37.

In evaluating a Section 404 permit application, the Corps must adhere to guidelines developed by EPA. 33 C.F.R. § 323.6; 40 C.F.R. Part 230 (1984). Several of these guidelines essentially incorporate into the Section 404 permit process a wetlands preservation bias. For example, Section 230.1(d) of the guidelines provides:

“From a national perspective, the degradation or destruction of special aquatic sites,<sup>3</sup> such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”

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<sup>3</sup> Special aquatic sites are defined as “geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values.” 40 C.F.R. § 230.3 (q-1). According to the regulations, however, wetlands are *automatically* deemed to be special aquatic sites whether they possess these qualities or not. 40 C.F.R. Part 230, Subpart E.

Similarly, Section 230.1(c) of the guidelines states that “[f]undamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem” unless certain conditions are met. Thus, any wetland area which is determined to be within the overly expansive grasp of Section 404 is *presumed* to be vital to the public interest without regard to its actual value or lack of value to the aquatic ecosystem. Even the Corps’ own regulations provide that the destruction or alteration of wetlands “should be discouraged as contrary to the public interest.” 33 C.F.R. § 320.4(b).

Contrary to the views regarding wetlands that are prevalent in the current Section 404 regulations, the scientific community has recognized that not all wetlands are valuable to the aquatic ecosystem:

“Just as all wetlands do not have all of the values prescribed to them . . . it must be emphasized that *all wetlands are not going to have all of the effects that are described*. The effect of a given wetland on water quality is very dependent on the hydrological characteristics of the area.” Kibby, *Effects of Wetlands on Water Quality, Strategies for Protection and Management of Floodplain Wetlands and Other Riparian Ecosystems* at 289 (U.S. Dept. of Agriculture 1978) (emphasis added).

The regulatory dilemma which has resulted from the overrating of wetland values was aptly expressed by Dr. Joseph S. Larson in his article *A National Program for Regional Wetland Assessment*, 5 Nat'l Wetlands Newsletter 2 (Sept.-Oct. 1984):

“Scientific evidence strongly suggests that every wetland does not perform every publicly-valued wetland function. Nonetheless, federal and state wetland protection policies continue to presume, in the absence of evidence to the contrary, that all functions are equally important in all wetlands. And under such policies, there is an apparent lack of linkage between the functional role of a wetland and the application of regulations.”

The Corps' current wetlands definition, which the government contends reflects good science, precludes categorization and evaluation of wetlands according to their actual contribution to water quality. This is in fact contrary to scientific knowledge about wetlands. See Scientists Report, National Symposium on Wetlands at 14 (sponsored by the National Wetlands Technical Council) (Nov. 1978) ("[g]eographic, climatic, hydrologic and other factors greatly affect the character and functions of wetlands. As a result, the transference of characteristics (values) of one wetland . . . to another must be done cautiously . . ."); Classification of Wetlands and Deepwater Habitats of the United States, Fish and Wildlife Service, Department of the Interior (1979). Consequently, there are many areas in this country which are being subjected to the Corps' regulatory program that have absolutely no connection to the goals of the CWA and which were never intended by Congress to be held captive in the federal regulatory system.

In addition to the absence of a scientific basis, there is also no statutory basis for the wetlands presumptions, which place a more stringent burden on property owners seeking to discharge in areas encompassed by Section 404 than the burden placed on applicants for permits under Section 403 or other sections of the CWA. Section 403 of the CWA regulates discharges into the "territorial sea, the waters of the contiguous zone, [and] the oceans." 33 U.S.C. § 1343(a). Although the CWA mandates that the Section 404(b)(1) guidelines be based on criteria established pursuant to Section 403 (33 U.S.C. § 1344(b)), the guidelines in fact differ markedly from the Section 403 criteria.<sup>4</sup> No justification can be found in the statute for such discrimination.

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<sup>4</sup> For example, the ocean criteria for evaluating dredged material provide that when the dredged material is "substantially the same as the substrata at the proposed disposal site" and the site of the origin of the material is "far removed from known historical

The Section 404(b)(1) guidelines also provide that "where the activity associated with a discharge . . . does not require access or proximity to or siting" within a "special aquatic site,"<sup>5</sup> including any wetland, "practicable alternatives . . . are *presumed* to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3) (emphasis added). This so-called "water dependency test"<sup>6</sup> similarly finds no support in the CWA, nor is there anything in the ocean discharge criteria which requires this additional test. The difficulties arising from the presumption that *practicable* land-based alternatives exist for a nonwater-dependent project are further intensified by the extremely broad definition used in determining what is "practicable."<sup>7</sup>

Under the guidelines, the Corps makes the initial determination as to whether a proposed activity requires access to water to fulfill its basic purpose. *In the case of a proposed project on an isolated or intermittent wet area, such as Madrona Marsh, however, the permit applicant obviously could never demonstrate water dependency since the proposed project site is wholly unconnected to*

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sources of pollution," no further testing for environmental impacts is required. See 40 C.F.R. §§ 227.13(b) and 227.13(b)(3)(ii). No such provision, however, exists in the Section 404(b)(1) guidelines, which are significantly more stringent than the Section 403 criteria.

<sup>5</sup> Defined *supra* at n.3.

<sup>6</sup> A project is considered nonwater-dependent if it does not require access or proximity to the special aquatic site in order to fulfill its basic purpose.

<sup>7</sup> "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." 40 C.F.R. § 230.10(a)(2).

any other body of water. Consequently, a permit would never issue unless the applicant could overcome the presumption that practicable alternatives exist.

As is evident from the foregoing discussion, the onerous nature of the presumptions regarding wetlands that are engrafted into the Corps' regulatory program substantially undercut the government's position regarding the effect of "the mere assertion of regulatory jurisdiction." Pet. Brief at 11. In the State of Alaska, for example, the exercise of jurisdiction over a particular area has quite often marked the beginning of the end for a permit applicant not only due to the foregoing presumptions but also because of the plethora of federal and state agencies that are afforded an opportunity to comment on a permit application.<sup>8</sup>

#### **1. The Sixth Circuit's Narrow Interpretation of the Wetlands Regulation Is Clearly Warranted in View of the Significant Impacts on Property Rights That Result From the Application of the Section 404 Regulations**

The substantial interference with private property rights that results from the "mere assertion" of Section 404 jurisdiction is precisely why the Sixth Circuit interpreted the Corps' jurisdiction narrowly. The court did so in order to avoid "a very real taking problem." *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 15a. The concern voiced by the lower court was in fact recently

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<sup>8</sup> A partial list of these agencies include the Environmental Protection Agency, Department of the Interior, Fish and Wildlife Service, National Marine Fisheries Service, Alaska Department of Fish and Game, Alaska Department of Environmental Conservation, and the Alaska Department of Natural Resources. "The inescapable result is a labyrinth from which an applicant may never emerge." Testimony of Robert Fleming before Senate Committee on Environment and Public Works Subcommittee on Environmental Pollution Concerning Implementation of Section 404 of the Federal Water Pollution Control Act in Alaska at 3 (June 23, 1980).

realized in *Florida Rock Industries, Inc. v. United States*, Civil Action No. 266-82L (Ct. Cl. May 6, 1985), where it was held that the denial of a Section 404 permit constituted a taking of the plaintiff's property since the land in question could "be put to no viable economic use without such a permit." *Id.* at 1. In the course of its opinion, the court cited with approval the following language from a state supreme court decision discussing the cost of wetlands preservation:

" '[T]he area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of state-wide concern. The benefits from its preservation . . . are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.' " *Id.* at 21, quoting *State of Maine v. Johnson*, 265 A.2d 711, 716 (Me. 1971).

*See also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

While the government, as well as the amici in support of it, is quite prolific in espousing the values and virtues of wetlands and in emphasizing the need to protect such areas, the government completely disregards the fact that it is individual property owners in this country who have been forced to bear the cost of this protection. As made clear by the court in *Florida Rock Industries*, however, "courts do not view the public's interest in environmental and aesthetic values as a servi-

tude upon all private property, but as a public benefit that is widely shared and therefore must be paid for by all." *Florida Rock Industries* at 21.

The case of Arnie Thomas, a homeowner in Appleton, Wisconsin,<sup>9</sup> ideally demonstrates that this burden is not being equally shared by all and illustrates the unreasonableness of the presumptions regarding wetlands and practicable alternatives contained in the Section 404 regulations. In 1981, Mr. Thomas extended his backyard an additional 8 feet to his property line by filling in a "swamp" area with 50 cubic yards of dirt. He then planted grass seed and started a vegetable garden on the filled-in land. The Corps asserted Section 404 jurisdiction over the property and ordered Mr. Thomas either to remove the dirt or apply for an "after-the-fact" Section 404 permit. Mr. Thomas decided to submit a permit application, which contained as one of its 55 questions what the effect of the project would be on navigation.

The "swamp" in Mr. Thomas' backyard, which the Corps sought to protect, was not connected to any other body of water. Although Mr. Thomas' neighbors supported his fill activity, saying the area was previously filled with rubbish and served as a breeding ground for rodents and mosquitoes, the Fish and Wildlife Service and EPA objected to the project. EPA argued that the project was not "water-dependent," that alternatives were available and that the cumulative impact of numerous small activities such as Mr. Thomas' could de-

<sup>9</sup> Army Corps File No. NCSCO-RF 80-480-13/VF, 80-302-15, Army Corps of Engineers, St. Paul District Engineer, 1135 U.S. Post Office, St. Paul, Minnesota 55101; Letter to Mr. Vartkes Broussalian from Major David E. Peixotto, Department of the Army (Official Memorandum) (April 1, 1982). (In this memorandum, Major Peixotto validated the facts of the two Section 404 cases contained in the Task Force Report, Appendix A —, and the case of Mr. Thomas). See also *Appleton: A Regulated City*, The Washington Post, April 7, 1981 at 14.

stroy protected resources. As a result, Mr. Thomas' permit application was denied.

The plight of Arnie Thomas reflects the unreasonableness of establishing a presumption that all wetlands are valuable to the aquatic ecosystem and that, where a project is not water-dependent, alternatives are presumed to exist. The ludicrous and patently unfair results that flow from applying such presumptions in cases such as Mr. Thomas' are illustrative of the types of abuses presently experienced by property owners who find themselves caught up in the Section 404 process. The question one must ask, however, is whether Congress ever intended, when it created the CWA, for the Corps' jurisdiction to extend to the point where such bewildering results would ensue. The answer one finds is no.

## II. THE SIXTH CIRCUIT'S DECISION IS FULLY SUPPORTED BY THE CLEAN WATER ACT AND ITS LEGISLATIVE HISTORY

The CWA was created by Congress in order to combat pollution in the "navigable waters" of the United States; it was not designed to operate as a wetlands preservation law. As will be shown below, while the term "navigable waters" was intended to have a more expansive meaning than that which it had traditionally, there is no evidence in the Act's history to indicate that the term was to include all wetlands. Rather, the 1972 legislative history makes it abundantly clear that the Corps' jurisdiction over navigable waters was *only* extended beyond the traditional limits to include those waters which might become navigable after reasonable improvements, and also the tributaries of waters that are navigable in fact.

To the extent Congress envisioned that certain wetlands might require protection in order to preserve the waters specifically identified in the CWA, there certainly was no intention to protect "every brook, creek, cattle

tank, mud puddle, slough, or damp spot in every land-owner's backyard across this Nation." 123 Cong. Rec. S26,722 (1977) (floor statement of Senator Tower). The protection, if any, to be extended to a particular wetland was only to be exercised in furtherance of the goals and objectives of the CWA.

**A. The Legislative History of the Clean Water Act Demonstrates That It Was Designed To Protect Water Quality and Is Not a Wetlands Preservation Law**

The government maintains in its brief that "if the Corps is to fulfill Congress' intent to protect ecologically important wetlands, then its threshold jurisdiction must be construed broadly." Pet. Brief at 14. Not only does the government fail to cite any authority in the history of the 1972 FWPCA amendments to support this finding of "congressional intent," but its position misinterprets the purpose of the CWA and, in particular, Section 404.

The CWA unequivocally states that its objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the primary goals of the CWA is to eliminate by 1985 "the discharge of pollutants into navigable waters." 33 U.S.C. § 1251(a)(1). The Section 404 program was established in order to help attain this goal by authorizing the "Administrator [of EPA] and the Secretary [of the Army] to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes." 118 Cong. Rec. H33,699 (1972) (statement of Senator Muskie).

While the legislative history of the FWPCA amendments of 1972 evinces Congress' intent to expand somewhat the traditional view of navigability, the history also indicates that the conferees in no way intended to com-

pletely discard concepts of navigation for purposes of jurisdiction under the Act:

"It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact . . . [S]uch waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today." *Id.*

This discussion of the term "navigable waters" suggests that, even though Congress wished to broaden the meaning of this term, it still intended for jurisdiction under the CWA to be limited to waters having some linkage to navigability. Although certain wetland areas may have to be regulated in order to protect the quality of these navigable waters, such regulation is permissible since it is tied directly to the goals of the Act and is not done solely to preserve a wetland. That the Corps' jurisdiction was to be limited to waters having some connection to navigability is also evident from a review of the congressional debates on the 1972 FWPCA amendments.

In discussing the new broader definition of "navigable waters," Congressman Dingell, an avid supporter and floor manager of the FWPCA amendments, made the following observation:

"The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be 'susceptible of being used . . . with reasonable improvement,' as well as those waterways which include sections pres-

ently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera. *United States v. Utah*, 238 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, [311] U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945) cert. den. 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) cert. den. 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954) . . . ." 118 Cong. Rec. H33,756 (1972).

A review of the cases cited by Congressman Dingell provides plentiful insight into where Congress intended to draw the jurisdictional line under Section 404.

In *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940), the Supreme Court had occasion to interpret the following traditional test of navigability set forth in the Daniel Ball case:

"'. . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.' " *Id.* at 406 n.21, quoting from *Daniel Ball*, 10 Wall. 557, 563 (1870) (emphasis added).

The Court construed the phrase "susceptible of being used, in their ordinary condition" as including those wa-

ters which might be navigable "after reasonable improvements." *Id.* at 409. The Court also determined that the "constitutional power of the United States over its waters" was not limited solely "to control for navigation" but that "[f]lood protection, [and] watershed development . . . are likewise parts of" the government's control. *Id.* at 426.

The Court thus extended the traditional concept of navigability to those waters which might be susceptible to use for commerce and recognized that Congress' authority was not merely limited to control for navigation.

The authority of Congress to control activities on non-navigable tributaries of navigable waters was decided by the Supreme Court in *Oklahoma ex rel. Phillips v. Atkinson Company*, 313 U.S. 508 (1941). In that case, the Court held that "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Id.* at 523. Furthermore, the Court determined that the power of the government over "flood control," as was recognized in *Appalachian Electric Power Company*, "extends to the tributaries of navigable streams." *Atkinson*, 313 U.S. at 526.

*Appalachian Electric Power Company* and its progeny are extremely useful in ascertaining Congress' intent with regard to the scope of the term "navigable waters." As indicated by Congressman Dingell, Congress' expanded view of this term was essentially derived from the opinions in these cases. While these opinions may have extended the term "navigable waters" to include waters "susceptible of being used" for navigation as well as tributaries of navigable waters, they did not go so far as to encompass all wetlands. This fact, coupled with the absence of any language regarding wetlands in the 1972 legislative history, suggests rather conclusively that Congress had no intention of including these areas within the Corps' Section 404 jurisdiction.

**B. To the Extent the Clean Water Act Encompasses Wetlands, It Certainly Does Not Include All Wetlands**

The government's primary support for its position that Congress fully intended to regulate wetlands under the CWA is based upon the 1977 amendments to the Act. Although the 1977 legislative history contains some discussion of wetlands and wetlands values, the term "navigable waters" was not redefined either to include or exclude areas such as wetlands. As a matter of fact, the *only* mention of the term "wetlands" in the final 1977 amendments is in Section 404(g)(1), which merely describes the procedure for state assumption of a dredge and fill program. 33 U.S.C. § 1344(g)(1).

The government also makes reference to statements by Senator Baker and Senator Muskie in support of its view that Congress, in the 1977 amendments, ratified the Corps' regulatory assertion of jurisdiction over all wetlands. There are, however, conflicting statements by both of these Senators in the legislative history which illustrate that there was actually considerable confusion by members of Congress regarding the proper scope of the Corps' jurisdiction. For instance, Senator Baker, in commenting upon the types of waters that are subject to Section 404 jurisdiction, clearly maintained the prerequisite hydrologic connection to traditionally navigable waters:

"A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes. Several Federal courts have endorsed the wisdom, and constitutionality, of this committee's observation that:

'Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the *navigable waters, portions thereof, and their tributaries.*' . . .

"Unless Federal jurisdiction is uniformly implemented for all waters, discharges located on non-navigable tributaries *upstream from the larger rivers and estuaries* would not be required to comply with the same procedural and substantive standards imposed upon their *downstream* competitors." 123 Cong. Rec. S26,718 (1977) (floor statement of Senator Baker) (emphasis added).

Moreover, Senator Muskie, who as the government notes was "one of the primary sponsors of the Act" (Pet. Brief at 26), took it upon himself to express Congress' overall dissatisfaction with the way in which the Corps had proceeded to regulate activities in this country under Section 404:

"There is not a Senator on the floor, including the Senator who is speaking, who supports Section 404 as it has been interpreted and implemented by the Corps of Engineers.

. . .

"The corps proceeded to take . . . section [404] and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over." 123 Cong. Rec. S26,728 (1977).

Senator Muskie also rejected any notion that Section 404 was intended to regulate *all* wetlands when, in response to Senator Dole's concern that "any standing water in a field where cattails, or other weeds have grown up around it" would fall within the ambit of Section 404, he stated that such an area would not be covered by Section 404 since the Corps' definition of "wetlands" was intended to describe "only the true swamps and marshes that are part of the aquatic ecosystem." 123 Cong. Rec. S26,767 (1977) (floor discussion between Senator Muskie and Senator Dole).

The government contends that Congress' failure to redefine the term "navigable waters" in the 1977 amend-

ments is tantamount to congressional ratification of the Corps' post-*Callaway* regulations, which extended regulatory jurisdiction over all wetlands, including "nonadjacent" or isolated wetlands. It must be noted, however, that the Corps' regulations concerning the latter type of wetland *were not even in effect* during the House debates on Section 404 in 1977. In addition, the regulations had been in place only briefly during the Senate's discussion of Section 404 amendments and had been operative for only five months prior to Congress' consideration and passage of the final conference report on the 1977 amendments.<sup>10</sup> While legislative silence may in some circumstances be viewed as congressional ratification of an agency's interpretation of a statute, this is only where the administrative interpretation has been "consistent" and "shown clearly to have been brought to the attention of Congress." *Kay v. Federal Communications Commission*, 443 F.2d 638, 646 (D.C. Cir. 1970). In the case at bar, neither of these factors has been satisfied.

While it may be asserted that the Corps must exercise jurisdiction over some critical wetlands to fulfill its legal obligations, the current scope of jurisdiction goes far beyond what has been sanctioned by Congress and the courts.

The 1975 decision of the United States District Court for the District of Columbia in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, is uniformly cited as supporting expansive Section 404 jurisdiction. *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979); *Avoyelles Sportsmen's League, Inc. v. Marsh*,

<sup>10</sup> See 3 Congressional Research Service, Library of Congress, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act at 49 (1978) (Section 404 amendments were passed by the House on April 5, 1977; by the Senate on Aug. 4, 1977; and both houses agreed to the conference report on Dec. 15, 1977); 33 C.F.R. § 209.120(e)(2)(i) (1976) (regulations became effective July, 1977).

715 F.2d 897 (5th Cir. 1983). In *Callaway*, the court determined that Congress, in the FWPCA of 1972, had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Id.* at 686. The traditional tests of navigability were found to be inapplicable to the term "navigable waters" for purposes of the FWPCA. Accordingly, the court determined that the definition of "navigable waters" which had been promulgated by the Corps in its Section 404 regulations and which encompassed only traditionally navigable waters failed to comply with the requirements of the FWPCA. *Id.*

*Callaway* did not explicitly include wetlands as part of the "nation's waters" to be regulated under Section 404; the court merely found that the Corps had interpreted the term "navigable waters" *too narrowly*. Neither the court's opinion nor the CWA as it existed in 1975 mentioned the term "wetlands," much less included wetlands as "navigable waters" within the ambit of Section 404.<sup>11</sup>

As previously indicated, Congress did not define the term "wetlands" in its amendments to the CWA. This task was therefore left to the agencies charged with administering Section 404. Those agencies must look to the purposes underlying the CWA in promulgating the relevant jurisdictional definitions.<sup>12</sup> The values behind

<sup>11</sup> It must be emphasized that this one-page District Court decision provides no legal analysis or reasoning for its conclusions. To the extent that this case conflicts with this Court's understanding of the CWA and its legislative history, it should be overruled.

<sup>12</sup> The Presidential Task Force Report on Section 404 also recognized that not every wetland was to be included within the Corps' regulatory jurisdiction:

"While Congress' definition goes beyond the traditional definition of 'navigable waters' covered by earlier Corps regulatory programs, it also does not encompass all biological 'wetlands' however defined or regardless of their connection to waters." Appendix A at A-7.

preserving a particular wetland must be tied to one of the stated goals of the CWA. As noted by Congressman Alexander in commenting upon the House Report to amend FWPCA in 1977:

"I do not believe the Congress intended for section 404 to cover all of the Nation's waters and wetlands. I believe the intent was to maintain Federal authority over dredging and filling operations in commercially navigable waters." 123 Cong. Rec. H10,418 (1977).

In his article, *The Public Interest Review Process*, Bernard N. Goode, Chief, Regulatory Functions Branch, Office of the Chief of Engineers, United States Army Corps of Engineers, specifically states that Section 404 "was never designed to protect wetlands, but rather to control the discharge of two types of pollutants into the nation's waters—dredged material and fill." 3 Nat'l Wetlands Newsletter 6-7 (Jan.-Feb. 1981).

As is evident from the preceding discussion, Congress in no way intended for Section 404 to reach all wetlands. Rather, the guiding principle for determining whether 404 jurisdiction extends to a particular wetland is whether a hydrologic connection exists between the wetland and any lake, river, stream, or tributary. This guiding principle is in fact equivalent to the Sixth Circuit's interpretation of the Corps' wetland regulation in this case. After reviewing the Corps' amended wetland regulation, and the Corps' interpretive statements pertaining thereto, the lower court construed the regulation as being limited to "lands such as swamps, marshes, and bogs" that have a direct hydrologic connection to "waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the 'waters of the United States.'" *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 15a. The District Court determined that the navigable waters contiguous to the

Riverside property had not contributed to the wetland characteristics of the land, except for the six instances of inundation over an 80-year period. Joint Appendix at 50. Absent the hydrologic connection to those waters, the Sixth Circuit was entirely correct in finding that the Riverside property fell outside the ambit of the Corps' jurisdiction under the CWA and its interpretation of the Corps' wetland regulation is fully consonant with the terms of the CWA and its legislative history.

#### CONCLUSION

Based upon the arguments presented herein and the reasons set forth in the brief of respondents, Riverside Bayview Homes, Inc., et al., the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: June, 1985.

# **APPENDIX**

**APPENDIX**

**THE VICE PRESIDENT  
OFFICE OF THE PRESS SECRETARY**

**FOR IMMEDIATE RELEASE**

**9:00 A.M.**

**Friday, May 7, 1982**

**CONTACT:** Peter Teeley  
Shirley Green  
202/456-6772

**Time and date are local**

**Announcement of administrative reforms to  
the regulatory program under Section 404 of the  
Clean Water Act and Section 10 of the Rivers and  
Harbors Act**

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Christopher C. DeMuth, Executive Director of the Presidential Task Force on Regulatory Relief, today announced the initiation of major administrative reforms of the U.S. Corps of Engineers' permit program. The reforms will dramatically reduce the delays in processing permit applications and, according to rough estimates by the Corps, could save \$1 billion annually.

The reforms will include: eliminating the multi-level bureaucratic review procedure, expanding the use of general permits, giving states more authority and responsibility for permit decisions, and clarifying the scope of the permit program. This effort to develop a workable and efficient permit program is based on the recommendations of William R. Gianelli, Assistant Secretary of the Army for Civil Works, and senior officials from EPA, the Departments of the Interior and Commerce, and other agencies.

## FACT SHEET

The U.S. Army Corps of Engineers  
Section 10/404 Regulatory Program

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries [sic] Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.
- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 815 days for applications requiring Environmental Impact Statements (EIS), and 270 days for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit applications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of \$1.5 billion annually.
- Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occurred even over relatively minor issues.

## CASE SUMMARY NO. 1

### LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to

water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reservoirs. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

#### CASE SUMMARY NO. 2

##### CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that

none of them offered significant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.

ADMINISTRATIVE REFORMS TO THE  
REGULATORY PROGRAM UNDER SECTION 404  
OF THE CLEAN WATER ACT AND  
SECTION 10 OF THE RIVERS AND HARBORS ACT

. . .

V. *Clarifying the Scope of the Permit Program*

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will

be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

\* \* \* \*

Supreme Court, U.S.  
FILED

(13)

No. 84-701

JUN 28 1985

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,  
*Petitioner,*  
v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit

**BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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June 28, 1985

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## **QUESTION PRESENTED**

Whether section 404 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, authorizing regulation of the deposit of dredged or fill material into "navigable waters," also grants jurisdiction for regulation of hydrologically isolated wetlands.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-701

UNITED STATES OF AMERICA,  
v. *Petitioner,*RIVERSIDE BAYVIEW HOMES, INC., *et al.*,  
*Respondents.*On Writ of Certiorari to the United States  
Court of Appeals for the Sixth CircuitBRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTSSTATEMENT OF INTEREST<sup>1</sup>

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Current Chamber membership includes more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. The Chamber regularly advocates its members' views in court on issues of national con-

<sup>1</sup> This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2. The parties' letters of consent are on file with the Clerk of this Court.

cern to the American business community. The Chamber's interest in environmental issues is well-established.<sup>2</sup>

This case is important to the business community because it involves the scope of the jurisdiction of the United States Government over certain isolated wetlands under section 404 of the Clean Water Act ("CWA" or "Act").<sup>3</sup> 33 U.S.C. §§ 1251, 1344 (1982). In particular, this case poses the question of whether hydrologically isolated wetlands are appropriately included in the regulatory definition of "waters of the United States"<sup>4</sup> for purposes of the dredged and fill permitting program which is administered jointly by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"). Under the Corps' present definition of "waters of the United States," the 80 acres of partially developed suburban land at issue here would be within the Corps' jurisdiction and subject to a prohibition against all development, merely because the land itself is sometimes wet.

The Chamber views the Government's assertion of jurisdiction over such hydrologically isolated wetlands as a classic example of federal regulatory overreaching. The

<sup>2</sup> See, e.g., *Dow Chemical Co. v. United States*, 749 F.2d 307 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3863 (U.S. June 10, 1985) (No. 84-1259); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 53 U.S.L.W. 4193 (U.S. February 27, 1985); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 595 F. Supp. 65 (D.D.C. 1984), appeal docketed, Nos. 84-5566-69 (D.C. Cir. 1984).

<sup>3</sup> The Federal Water Pollution Control Act was originally enacted by the Act of June 30, 1948, ch. 758, 62 Stat. 1155. The Act has been subsequently amended and was substantially revised in 1972. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816. In 1977, the Act again was substantially revised and renamed the Clean Water Act. 33 U.S.C. § 1251 note. The statute is referred to by its new name throughout the brief.

<sup>4</sup> The definition of "waters of the United States" is set forth at 33 C.F.R. § 323.2(a) (1984).

CWA is not, and was not designed to be, a wetlands preservation statute. Yet, by asserting regulatory jurisdiction over such wetlands, the Government has attempted to convert this Act into the equivalent of a national wetlands law, even though productive economic use of such lands would pose no threat to the quality of the nation's waters.

Many Chamber members have had development plans ruined by the Corps' assertion of CWA jurisdiction over their property. Other members have been denied the potential economic benefits that result from development. As the principal voice of the American business community, the Chamber is well-suited to present the broad interests of business in this case.

#### STATEMENT

The issue presented in this case is whether hydrologically isolated wetlands<sup>5</sup> are appropriately included within the scope of the regulatory definition of "waters of the United States"<sup>6</sup> for purposes of the dredged and fill permitting program of the CWA.

Section 404 of the CWA provides for issuance of permits for the discharge of dredged or fill material into the "navigable waters," defined by section 502(7), 33 U.S.C. § 1362(7), as "waters of the United States, including the territorial seas." The term "waters of the

<sup>5</sup> For purposes of the CWA, "wetlands" are defined by the Corps as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1984).

<sup>6</sup> See footnote 4, *supra* at 2.

"United States" is not defined in the Act, but has instead been defined by the Corps' regulations. *See* 33 C.F.R. § 323.2(a).

As demonstrated in this case, the Corps has interpreted section 404 and this implementing regulation as a license to engage in the broad-ranging regulation of hydrologically isolated wetlands which have no relationship whatsoever to the purpose of the CWA—"to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In fact, as demonstrated below, the basic rationale for extending the concept of "waters of the United States" to any wetlands at all was to insure that pollution is stopped at its source, before it could reach those water bodies traditionally viewed as navigable.<sup>7</sup> This rationale is wholly lacking in the context of hydrologically isolated wetlands. Consequently, the Chamber asserts that Congress never intended to exert CWA jurisdiction over such isolated wetlands.\*

In analyzing the question before this Court, it is important to note the several matters *not* at issue here: the ecological value of wetlands; the importance of protecting wetlands; and the constitutional authority of

<sup>7</sup> See, e.g., *United States v. Byrd*, 609 F.2d 1204, 1210 (7th Cir. 1979) (pertaining to wetlands adjacent to a lake and stating, "Destruction of all or most of the wetlands around [the lake] . . . could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake. . . .").

\* Indeed, no court has ever held that Congress so intended. *See*, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (pertaining to backwater swamp annually flooded by rivers); *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (pertaining to wetlands hydrologically linked to river 30 feet away); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (pertaining to wetlands adjacent to lake, the destruction of which could degrade the water quality of the lake); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (pertaining to salt ponds periodically submerged by waters from San Francisco Bay).

Congress to enact wetlands preservation legislation if it so chooses. What is at issue in this case is whether Congress intended, in passing the CWA, to extend the Government's authority to hydrologically isolated wetlands, thereby effectively prohibiting development in many cases. We think not.

The wetlands at issue in this case are distinguishable from many acres of other wetlands which do, arguably, play some role in preserving the quality of the nation's waters. Here, there is no hydrological connection by which pollution might move between the water of the wetland itself and other surface water bodies. Although surface waters do exist in the vicinity,<sup>8</sup> the District Court found that:

the contiguous navigable waters have not contributed to the wetland type of vegetation on defendants' property.

Pet. App. 25a.

Most significantly, the district court expressly adopted expert testimony that "the nearness of the lake and canals had *no hydrological effect* on the soil beyond a 50 to 100-foot distance (emphasis added)." *Id.* See also Pet. App. 34a. This hydrological isolation stems from the type of soil comprising the land in question, i.e., Lamson soil, which is impermeable, does not drain well, and is characterized by high water table and water near the surface. Pet. App. 25a; Jt. App. 108.<sup>10</sup>

Despite the Government's assertion of CWA jurisdiction over this tract, neither the CWA nor its legislative history reflects any intent on the part of Congress to

<sup>8</sup> Lake St. Clair is one mile east of the land, the Clinton River is to the north and Black Creek is to the east. Petitioner's Appendix ("Pet. App.") 2a, 6a.

<sup>10</sup> In addition to impermeable soil, measures taken in 1973 to protect homes and businesses from the flood waters of Lake St. Clair impaired drainage on the land. Pet. App. 3a.

exert jurisdiction over such hydrologically isolated wetlands. Instead, they indicate that Congress intended the term "waters of the United States" to include only those water bodies traditionally considered to be the conduits of interstate and foreign commerce and other waters which are hydrologically connected thereto—not hydrologically isolated wetlands such as those involved herein. See *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong. 1st Sess. (1973) (Volumes 1 and 2); *A Legislative History of the Clean Water Act*, 95th Cong., 2d Sess. (1978) (Volumes 3 and 4) (hereinafter cited as "Legis. Hist.") 1 Legis. Hist. at 178, 250-251.

#### SUMMARY OF ARGUMENT

1. The CWA and the legislative history of the 1972 Amendments and the 1977 Amendments to the Act fail to establish that Congress intended to extend federal jurisdiction under the CWA to hydrologically isolated wetlands. By the terms of the CWA itself (*see, e.g.*, 33 U.S.C. § 1251(a)), and as reflected in the legislative history of the 1972 Amendments and 1977 Amendments, Congress' goal in enacting the CWA was the protection of water quality. The exercise of federal jurisdiction over hydrologically isolated wetlands, such as those at issue herein, is wholly unrelated to the goals of the CWA and goes far beyond the limits of jurisdiction granted by section 404 of that Act. 33 U.S.C. § 1344.

2. The CWA is neither a wetlands preservation act nor a land use planning act. The legislative history of the 1972 and 1977 Amendments fails to demonstrate that Congress intended the CWA to be a wetlands protection statute. Further, there is no indication that Congress intended the CWA to be used as a land use planning mechanism to regulate local development. Indeed, land use planning is a matter traditionally left to states and local authorities, and many states have adopted their own measures to protect wetlands.

#### ARGUMENT

##### I. CONGRESS HAS NEVER MANIFESTED ANY INTENT TO EXTEND FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT TO HYDROLOGICALLY ISOLATED WETLANDS.

###### A. The Goals of the CWA are Attainable Without Any Federal Jurisdiction Over Such Isolated Wetlands.

The CWA is a water quality statute. Its simply-stated objective is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress adopted a regulatory scheme designed to limit, and then eliminate, pollutants discharged into navigable waters. 33 U.S.C. §§ 1311(a), 1342, 1344.

Recognizing that water moves in "hydrological cycles,"<sup>11</sup> Congress enunciated that its intent was to control pollution at its source. Consequently, Congress adopted an "end of pipe" technology approach for liquid effluents,<sup>12</sup> a point source discharge approach for dredged or fill materials,<sup>13</sup> and extended the geographical jurisdiction of the Act to the limits necessary to achieve its goals.

Congress realized that to preserve the quality of waters traditionally considered to be navigable, it was necessary to extend the scope of the Act to control and regulate water hydrologically connected thereto. The unrestricted discharge of potential pollutants into hydrologically connected waters could affect the quality of those waters and consequently, the quality of the water bodies forming the traditional conduits of commerce.

Congress also recognized, however, that federal jurisdiction over the waters and activities therein was not

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<sup>11</sup> 2 Legis. Hist. at 1495.

<sup>12</sup> See, e.g., sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342.

<sup>13</sup> See, e.g., section 404 of the CWA, 33 U.S.C. § 1344.

unlimited. Accordingly, Congress tailored its intentions to meet its express goals. Indeed, as set forth in detail below, the statements of the conferees clearly demonstrate that, in their view, the jurisdictional reach of the federal government was confined to those water bodies forming a conduit for commerce and other waters hydrologically connected to such water bodies.<sup>14</sup> This perceived limitation on the jurisdiction of the federal government, whether or not a correct interpretation of the actual extent of the power of Congress to regulate the nation's waters under the Commerce Clause, art. I, § 8, cl. 3, forms the limiting principle of the federal government's jurisdiction under the CWA.

Although Congress undoubtedly could, if it so chooses, regulate certain dredged or fill activities in isolated or unconnected wetlands under its Commerce Clause power, Congress did not intend to do so in enacting the CWA. Congress specifically sought to maintain the quality of those water bodies forming a conduit of commerce and recognized the need to regulate the use of other hydrologically connected waters, the degradation or destruction of which could have an effect on those conduits of commerce. The Commerce Clause power was exercised specifically to accomplish these objectives. In this sense the term "'navigable waters' [is] given the broadest possible constitutional interpretation" as intended by Congress, (*see 1 Legis. Hist. at 818*), even though it does not include hydrologically isolated wetlands. Accordingly, the CWA should not be interpreted as a blanket grant to regulate all waters of whatever nature and wherever

<sup>14</sup> The geographic scope of federal jurisdiction over water bodies is defined in terms of conduits of waterborne commerce. Federal regulatory authority within these geographical confines, however, is not limited to navigability alone, and the abatement of pollution is well within the power of the federal government to exercise control over its waters. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

found, regardless of their potential to affect the quality of the nation's "navigable waters."

**B. The 1972 Amendments Neither Expressly Nor Implicitly Adopted any Regulatory Device for Wetlands, Much Less For Those Wetlands Which Are Hydrologically Isolated.**

When it enacted the 1972 Amendments, Congress did not enunciate any policy or enact any provision regarding wetlands preservation or regulation. Indeed, nowhere in the 1972 Amendments or their legislative history are wetlands even mentioned.

The 1972 Amendments did, however, adopt section 404, a provision designed primarily to consolidate in the Corps permitting authority for the discharge of dredged or fill material into navigable waters.<sup>15</sup> Like the rest of the 1972 Amendments, section 404 did not reference wetlands.

In the 1972 Amendments, Congress authorized the Corps to issue permits for the discharge of dredged or fill material into navigable waters. Section 404 "navigable waters" were defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). While this definition is less than explicit, the legislative history of the 1972 Amendments succinctly establishes Congress' intent to regulate only those bodies of water

<sup>15</sup> Under the Senate version of the 1972 Amendments, the discharge of dredged or fill material was treated like the disposal of any other pollutant requiring a permit issued by EPA pursuant to proposed section 402. S.2770, 92d Cong., 1st Sess. § 402 (1971). The House, recognizing that permits for dredging activities in navigable waters were then required under the Rivers and Harbors Act of 1899, and were issued by the Corps, designated the Corps rather than EPA as the appropriate permit issuing authority in its version of the 1972 Amendments. H.R. 11896, 92d Cong., 2d Sess. § 404 (1972). The agreement reached at conference adopted the House bill insofar as it related to the Corps' permitting and regulating authority. 1 Legis. Hist. at 177.

having potential for involvement as conduits of commerce and waters hydrologically connected thereto. As shown below, isolated wetlands unconnected in a hydrological sense, were not contemplated by Congress.

In the Senate version of the 1972 Amendments, "navigable waters" were defined as:

[t]he navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.

S. 2770, 92d Cong., 1st Sess. § 502(h) (1971). In explaining the purposes of this definition, the Senate Committee on Public Works stated that:

[t]he control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of [prior laws was] severely limited. *Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.*

<sup>2</sup> Legis. Hist. at 1495 (emphasis added).

The Senate definition encompasses only those water bodies traditionally considered to be the conduits of interstate and foreign commerce and other water bodies which are hydrologically connected thereto. Given the fact that "[w]ater moves in hydrologic cycles," (*id.*), the Senate recognized that little would be accomplished by controlling pollution only in navigable waters if unrestricted discharges were permitted in connected water sources. However, the Senate clearly was not addressing lands that are sometimes wet that would not, because of their isolation, be the source of pollutants in "navigable waters."

The House version of the 1972 Amendments originally defined navigable waters as:

[t]he navigable waters of the United States, including the territorial seas.

H.R. 11896, 92d Cong., 2d Sess. § 502(8) (1972). The House Committee on Public Works stated in its report that:

[o]ne term that the Committee was reluctant to define was the term "navigable waters". The reluctance was based on a fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation. . . .

<sup>1</sup> Legis. Hist. at 818. Thus, the House definition was intended to be co-extensive with the federal government's constitutionally permissible jurisdiction over navigable waters.<sup>16</sup> Viewed in this light, and with reference to the case law existing at the time,<sup>17</sup> the House definition of navigable waters was essentially the same as that of the Senate, and included waters traditionally considered to be

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<sup>16</sup> In defining the term "navigable waters" Congress was aware of and concerned with prior administrative interpretations of this term which severely limited the geographic reach of the federal government. 1 Legis. Hist. at 327, 818. To avoid similar limitations from being imposed in the case of the CWA, Congress sought to make very clear, that "navigable waters" was to encompass not only the traditional conduits of commerce, but also, all waters hydrologically connected thereto.

<sup>17</sup> The case law at the time of the 1972 Amendments, defined navigable waters of the United States subject to regulation under the Commerce Clause as those which were navigable in fact, made so with reasonable improvement, non-navigable portions of otherwise navigable waters and tributaries of navigable waters. *The Daniel Ball*, 77 U.S. 999 (10 Wall. 557) (1870); *The Montello*, 87 U.S. 391 (20 Wall. 430) (1874); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1920); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1949); *Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1940).

conduits of commerce and other waters hydrologically connected thereto. The intent of this definition was expressly confirmed by the Conference Committee.

The Conference Committee defined "navigable waters" as:

[t]he waters of the United States, including the territorial seas.

1 Legis. Hist. at 327. While the Committee struck the word "navigable" from the definition proposed by the House, the Committee's explanation of its actions demonstrates that the substantive effect of the definition was intended to be no broader than the jurisdictional scope established in the House and Senate versions of the definition.

In the Senate Report on the Conference, the Senate conferees stated that:

One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."

The conference agreement does not define the term. The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. *It is intended that the term "navigable waters" include all water bodies, such as lakes, streams and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other streams of transportation, such as highways or railroads, a continuing highway over which com-*

*merce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today.*

1 Legis. Hist. at 178 (emphasis added).

The same intent of regulating only those water bodies forming a conduit for commerce and waters hydrologically connected thereto was expressed by the House Conferees who recognized a distinction between the new concept of conduit of commerce and the old technical navigable in fact test:

[T]he conference bill describes the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographic sense. It does not mean "navigable waters of the United States" in a technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded the limited view of navigability—derived from the Daniel Ball case . . . —to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as . . . waterways which include sections presently obstructed by falls, rapids, and sand bars, currents, floating debris, et cetera . . . .

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power . . . to regulate commerce with Foreign Nations and among the several States" . . . . Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States

as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.”

<sup>1</sup> Legis. Hist. 250-251 (Statement of Rep. Dingell) (emphasis added).

Moreover, the Conferencee emphasized the purpose for which the statute was to be enacted:

Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, *for water quality purposes.*

*Id.*

The legislative history of the 1972 Amendments demonstrates that while not explicitly defining the term “navigable waters,” Congress intended it to encompass all waters forming a conduit for interstate and foreign commerce and all waters which are hydrologically connected thereto, the use, destruction or degradation of which would affect the quality of these main water bodies. Isolated wetlands were not viewed by Congress as “navigable waters” and were not intended to be covered by the Act.

### C. The Legislative History of the 1977 Amendments Reflects No Congressional Intent to Include Hydrologically Isolated Wetlands in the Definition of “Navigable Waters.”

No action taken subsequent to 1972 alters the conclusion that hydrologically isolated wetlands do not fall within the meaning of the term “navigable waters” for purposes of the CWA. As in 1972, the legislative history to the 1977 amendments fails to lend any support to the proposition that hydrologically isolated wetlands fall within the purview of the Government’s regulatory au-

thority.<sup>18</sup> Significantly, the 1977 amendments did nothing to change the statutory definition of “navigable waters.”<sup>19</sup> Thus, it is the history of the 1972 amendments rather than the history of the amendments of 1977, that is instructive on the issue of legislative intent with respect to the meaning of “navigable waters” and the reach of the Corps’ jurisdiction.<sup>20</sup>

The legislative history to the 1977 amendments reconfirms that Congress’ objective in enacting the statute was the protection of water quality.<sup>21</sup> Congress evidenced its concern for water quality when it added, in 1977, two provisions in section 404 only after making, or requiring

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<sup>18</sup> Note that the Corps has equivocated on its own thoughts and position concerning the definition of “navigable waters.” On May 12, 1983, the Corps published proposed regulations providing that in order for wetlands to be “adjacent” to waters of the United States and therefore “navigable waters” under the CWA, they must not only be “bordering, contiguous, or immediately neighboring,” but must also have “a reasonably perceptible surface or sub-surface hydrologic connection to a water of the United States.” 48 Fed. Reg. 21466, 21474 (1983). The currently applicable regulations, promulgated in 1977, contain a much broader definition of navigable waters. See 33 C.F.R. § 323.2(a).

<sup>19</sup> The 1977 legislative history does reflect a concern over the excessive exercise of jurisdiction by the Corps. In the House of Representatives, H.R. 3199 passed overwhelmingly, limiting the extent of the Corps’ jurisdiction. After narrowly defeating a comparable provision offered by Senator Bentsen, the Senate declined to redefine “navigable waters,” in its bill, S.1952, which was essentially the version adopted by the Conference Committee.

<sup>20</sup> Congressional inactivity in 1977 with respect to the definition of “navigable waters” ought not to be construed as an expression of congressional intent. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966); *Helvering v. Hallock*, 309 U.S. 106 (1940).

<sup>21</sup> See, e.g., Statement of Senator Muskie inserting testimony of Russel Train declaring that the “overriding purpose” of the CWA is “to restore and maintain the ecological health of our nation’s waters.” 4 Legis. Hist. at 851.

the Corps to make, a threshold determination regarding the effect on water quality. 33 U.S.C. § 1344(e), (f).

One such provision, subsection 404(e), authorized the Corps to issue general permits for categories of activities involving discharges of dredged or fill material, only when such activities have been determined to have "minimal cumulative adverse effects" on water quality. Similarly, Congress added subsection 404(f), which exempted from the operation of section 404 certain activities, including normal farming, silviculture, and ranching activities, that Congress deemed not to have a serious adverse impact on water quality. As expressed in the Conference Report to the 1977 amendments:

These specified activities should have no serious adverse impact on water quality if performed in a manner which will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody and which will not reduce the reach of the affected waterbody.

3 Legis. Hist. at 283.

Congress' focus, then, continued to be the protection of water quality. Recognizing that certain activities would not have adverse effects on water quality, Congress proceeded to exempt them, or authorize their exemption, from the requirements of section 404. Indeed, if wetlands protection *per se* rather than water quality were at the heart of the CWA, it is unlikely that Congress would have adopted these exemptions.<sup>22</sup>

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<sup>22</sup> It is of note that Congress has seen fit to introduce several proposals with the express purpose of preserving wetlands. Indeed, several wetlands protection bills have been introduced in the current session of Congress. Prominent among the legislation introduced this session is H.R. 1203, 99th Cong., 1st Sess. (1985), the Emergency Wetland Resources Act of 1985. Similarly, the Senate has introduced S. 740, 99th Cong., 1st Sess. (1985), the Emergency Wetlands Resources Act of 1985, which provides for a range of activities aimed at protecting wetlands.

[Continued]

## II. THE CWA IS NEITHER A WETLANDS PRESERVATION ACT NOR A LAND USE PLANNING ACT.

Notwithstanding the overriding water quality objective of the CWA, section 404 has been expanded such that it now encompasses wetlands preservation and land use management. As discussed above, this expansion is entirely inconsistent with Congress' intent.<sup>23</sup> Moreover by this expansion, the Government is entering a realm of broader land use issues that are appropriately regulated by the states through local legislation.

Prior to engaging in any activity which involves the discharge of dredged or fill material into navigable waters, a person must obtain a permit from the Corps. 33 U.S.C. §§ 1311, 1344. Absent such a permit, the activity is in violation of the CWA, and the person en-

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<sup>22</sup> [Continued]

Other wetlands protection legislation introduced this session includes: H.R. 572, 99th Cong., 1st Sess. (1985), the National Wetlands Inventory and Evaluation Act (a bill to authorize the Secretary of the Interior to classify and inventory wetlands resources, to measure wetlands degradation, to evaluate the environmental contribution of natural wetlands, and for other purposes); H.R. 1000, 99th Cong., 1st Sess. (1985), S.626, 99th Cong., 1st Sess. (1985), the Farm Debt Restructure and Conservation Set Aside Act of 1985 (a bill to authorize the Secretary of Agriculture to acquire easements for conservation, recreational and wildlife purposes in wetlands, uplands and highly erodible land); and S. 1035, 99th Cong., 1st Sess. (1985), the Fragile Lands Conservation and Wetlands Protection Act of 1985 (a bill to promote the conservation of highly erodible land and wetlands, and for other purposes).

<sup>23</sup> In addition to not being authorized under the CWA, the Corps' 404 program has exacted substantial costs from the regulated community. These costs are borne not only by permit applicants but also by people who would otherwise benefit from the activities requiring a permit. As stated by the Office of Technology Assessment, "Projects that are abandoned, made less profitable or never initiated mean potential losses in job opportunities, economic developments and tax revenue." Office of Technology Assessment, Congress of the United States, OTA-0-206, *Wetlands Their Use and Regulation* (1984) at 153.

gaging in the activity is subject to civil penalties and criminal sanctions. 33 U.S.C. §§ 1311, 1339. Accordingly, the Corps often is the final arbiter of whether an activity is or is not conducted. In the case of isolated wetlands, this role assumed by the Corps places it in the position of determining the propriety of local land development. *See, e.g.*, 40 C.F.R. Part 230 (1984) (Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, requiring an assessment of practicable alternatives).

The regulation and control of land use, however, is traditionally a function performed by local governments which, unless usurped deliberately by Congress, remains with the states. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). This traditional state role was expressly recognized by Congress in the CWA. 33 U.S.C. § 1251(b). In the declaration of goals and policy of the 1972 Amendments, Congress stated that it was its policy to:

*[R]ecognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources.*

*Id.* The role of the states also was recognized by Congress when considering the 1977 Amendments. As expressed by Congressman Roberts in debating the conference report to the 1977 CWA amendments:

More importantly, the Federal Government cannot and should not be expected to assume the entire responsibility for environmental protection. The States and local governments have a significant role to play. Yet an expanded Federal program would discourage the States from exercising their responsibilities to protect water and wetland areas.

<sup>3</sup> Legis. Hist. at 348 (Statement of Mr. Roberts). See also 3 Legis. Hist. at 419 (Statement of Mr. Harshaw)

("The conference amendment recognizes that the States should be responsible for controlling the discharge of dredged or fill material in State waters that do not involve interstate or foreign commerce.").

Being essentially a land use control function, the protection of hydrologically isolated wetlands is thus appropriately exercised by the states. Indeed, numerous states—nearly half—have enacted wetlands protection legislation.<sup>24</sup>

All of the coastal states have adopted some legislation to protect coastal resources. 2 F. GRAD, ENVIRONMENTAL LAW § 10.04 (1984). Nearly all of this legislation provides, in essence, that its purpose is to protect, preserve and enhance wetlands and other coastal areas, while pro-

<sup>24</sup> *See, e.g.*, ALA. CODE §§ 9-7-10 to 22 (1980, Supp. 1984); ALASKA STAT. §§ 46.40.010 to .210 (1982, Supp. 1984); CAL. PUB. RES. CODE §§ 5001.5-65 (Supp. 1984); CONN. GEN. STAT. chap. 440, §§ 22a-28, 22a-90 to 122 (1975, Supp. 1983); DEL. CODE ANN. tit. 7, §§ 7001-7013 (Supp. 1983); GA. CODE §§ 12-5-210 to 312 (1982); HAWAII REV. STAT. §§ 205A-1 to 22 (1976, Supp. 1982); LA. REV. STAT. ANN. tit. 49, ch. 213, §§ 213.1 to 22 (West 1985); ME. REV. STAT. ANN. tit. 38, §§ 471-478, tit. 12, §§ 4751-4758 (1978, Supp. 1984); MD. NAT. RES. CODE ANN. §§ 9-101 to 501 (1974); MASS. ANN. LAWS ch. 131, §§ 40, 40(a), ch. 252, §§ 1-24 (Michie/Law Co-op. 1980, Supp. 1985); MICH. STAT. ANN. §§ 18-595(51) to (72) (Callaghan Supp. 1985); MINN. STAT. §§ 105.37 to .403 (1977, Supp. 1985); MISS. CODE ANN. §§ 49-27-1 to 69 (Supp. 1984); MONT. CODE ANN. §§ 75-7-101 to 308 (1983, 1984); N.H. REV. STAT. ANN. §§ 483-A:1-7 (1983); N.J. STAT. ANN. §§ 13:9A-1A to 9A-6, 17-1 to 17-86, 18A-1 to 18A-29 (West 1979, Supp. 1984); N.Y. ENVT. CONSERV. LAW §§ 24-0101 to 1305, §§ 25-0101 to 0404, §§ 34-0101 to 0113 (McKinney 1981); N.C. GEN. STAT. §§ 113A-100 to 128 (1983); N.D. CENT. CODE §§ 29-06.31-01 to 10 (Supp. 1983); PA. STAT. ANN. §§ 11941, 11945 (Purdon Supp. 1985); R.I. GEN. LAWS §§ 2-1-13 to 27, §§ 46-23-1 to 18 (1980 Supp. 1983); S.C. CODE ANN. tit. 48, ch. 39, §§ 48-39-10 to 220 (Supp. 1984); TEX. NAT. RES. CODE, §§ 33.001 to .238, §§ 155.1 to .9 (Vernon 1982, Supp. 1984); VA. CODE tit. 62, §§ 62.1-13.1 to 13.8 (1982, Supp. 1985); WASH. REV. CODE ANN. §§ 90.58.020 to .140 (Supp. 1985); W. VA. CODE art. 5B §§ 20-5B-1 to 14 (1981).

viding for sound resource development and management, and for the protection of certain private rights. *Id.* See, e.g., MD. NAT. RES. CODE ANN. § 9-102 (1974) (stating a purpose of preserving and protecting wetlands functions while preserving riparian rights); MISS. CODE ANN. § 49-27-3 (Supp. 1984) (providing for preservation of natural state of coastal wetlands and prevention of their despoilation except under limited circumstances); N.Y. ENVT. CONSERV. LAW § 25-0102 (McKinney 1981) (providing for preservation and protection of tidal wetlands); VA. CODE § 62.1-13.1 (1982, Supp. 1985) (providing for preservation of wetlands and prevention of their despoilation and destruction together with accommodation of necessary economic development in manner consistent with wetlands preservation).<sup>25</sup>

Consequently, in view of the fact that the legislative history establishes that the CWA was not intended to be either a wetlands preservation act or a land use planning act, the Government's attempt, through the exercise of jurisdiction under section 404, to preserve and regulate the use of hydrologically isolated wetlands should be rejected.

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<sup>25</sup> Examples of other states with wetlands protection statutes include Connecticut, whose statute provides for the protection of tidal wetlands through the requirement of permits to engage in regulated activities on such tidal wetlands. CONN. GEN. STAT. §§ 22a-28 to 32 (Supp. 1983). The State of Maryland's statutory scheme addresses the protection of wetlands and riparian rights, providing that, *inter alia*, the Secretary of Natural Resources promulgate rules and regulations "governing dredging, filling, removing, or otherwise altering or polluting private wetlands." MD. NAT. RES. CODE ANN. § 9-302 (1974). The Rhode Island statute declares that "[i]t is the public policy of this state to preserve the purity and integrity of the coastal wetlands of this state," and authorizes establishment of a program to regulate the disturbance or use of wetland areas. R.I. GEN. LAWS §§ 2-1-13 to 15 (1980, Supp. 1983).

## CONCLUSION

For these reasons and those stated in the Brief of Respondents Riverside Bayview Homes, Inc., the Chamber respectfully urges the Court to rule that hydrologically isolated wetlands do not fall within the jurisdiction granted by section 404 of the CWA.

Respectfully submitted,

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